UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 9, 2018

9:10 AM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

ECRO: KAREN

HEARING re RMBS Claims Estimation Trial

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

HOWELL SHUSTER & GOLDBERG LLP
Attorneys for RMBS
750 Seventh Avenue, 26th Floor
New York, NY 10019

BY: DORIT UNGAR BLACK
DWIGHT A. HEALY
DANIEL P. GOLDBERG
NEIL R. LIEBERMAN
MICHAEL SHUSTER

WILLKIE FARR & GALLAGHER LLP
Attorneys for the Debtor
787 Seventh Avenue
New York, NY 10019

BY: TODD G. COSENZA

WILLKIE FARR & GALLAGHER LLP
Attorneys for the Debtor
1875 K Street, NW
Washington, DC 20006

BY: JOSEPH G. DAVIS

ROLLIN BRASWELL FISHER LLC
Attorneys for Plan Administrators
8350 E Crescent Parkway, Suite 100
Greenwood Village, CO 80111

BY: MICHAEL ROLLIN

ALSO PRESENT TELEPHONICALLY:

ROBERT MADDEN
CHRISTOPHER DESIDERIO
JANE STROBEL
JAMES MOORE
KYLE BURNS
SCOTT LEWIS
PATRICK MOHAN
PAUL SHALHOUB
TRACY HENDERSON

P R O C E E D I N G S

THE COURT: Mr. Shuster. Very good to see you.

MR. SHUSTER: Good to see you too, Your Honor.

THE COURT: Please have a seat, everyone.

MR. SHUSTER: I want to start by personally thanking the Court for rescheduling the closings.

THE COURT: No thanks necessary. We're just very glad to see you.

MR. SHUSTER: Thank you. I also want to thank the Court on behalf of the Trustees for the Court's time and attention and patience and good humor throughout these proceedings, going all the way back. And I want to say that it has been a distinct pleasure for my team, my colleagues, I should say, and me to contest these claims in Your Honor's courtroom against such worthy adversaries from the Willkie and Rollin Braswell firms.

And now I'd like to go on to say why we are right and they are wrong --

[LAUGHTER]

-- about estimation of these claims. So, Your Honor, before I get into our slides --

THE COURT: Sure.

MR. SHUSTER: -- I wanted to give an overview of how we see the case and the evidence.

THE COURT: Okay.

MR. SHUSTER: First, we all know that it starts with representations and warranties that Lehman made in securitizations that it created, where it said that on every single one of the hundreds and thousands of loans that it securitized in these securitizations, there was no untrue statement of material fact in the documents submitted for loan underwriting, and that each borrower did not fail to provide material information and did not misstate any material information.

THE COURT: So, not to stop you before you even --

MR. SHUSTER: Yes.

THE COURT: -- get up a head of steam, so your characterization of those directed warranties, does that mean that effectively negates the requirement of seller knowledge entirely?

MR. SHUSTER: Well, there is no requirement of seller knowledge in the representations and the portions of the representations that we're relying upon. Yes, that's our position.

So, I said in my opening that we have provided in the protocol, in which we had provided proof of breach of the representations and warranties on a breach by breach basis on roughly 105,000 breaches; that the evidence was what we said it was, and we would show that to be true; and that the plan administrator did not, in any specific

evidentiary way, rebut the evidence on a breach by breach basis. Those things remain true. We have --

THE COURT: But this is where I just -- you're going to have to help me, because you're going to have to explain to me on what basis you think I can conclude that on a breach by breach basis, you carried the burden of proof. Because we all agree, you all agree, to not do samples.

So, all of the discussion in the case law about sampling is okay, okay, just to be clear, it was never said in this case before you arrived, at any point, that sampling would never be okay. Okay?

So, you all agreed in the 9019 settlement that you weren't going to do sampling, right?

MR. SHUSTER: I'd rather not get into that. We don't have any written agreement to that effect, but we did not present a sample to prove a breach rate, yes. We presented a sample to prove an agree rate with our findings by Mr. Morrow, but not a sample that would be used to extrapolate a breach rate --

THE COURT: Right.

MR. SHUSTER: -- across the entire body of securitized loans.

THE COURT: Okay. Instead, when your case started in November, I believed that what you were doing was two things. One, presenting exemplar loans, okay -- exemplar

coming from the same root as the word sample, but be that as it may -- exemplar loans and evidence as to how good the process was. And that you were going to therefore say exemplar loans, great process equals carrying a burden of proof on every breach and every loan, right?

MR. SHUSTER: I don't think I presented it that way --

THE COURT: Okay.

MR. SHUSTER: -- in my opening. I think --

THE COURT: My goal here is to understand... My goal this morning is to allow you to convince me that you're right. So, I am just communicating to you these disconnects where I don't -- when you make this very bold statement about carrying the burden of proof, I don't understand it.

MR. SHUSTER: Okay.

THE COURT: Okay? So, I'll try to stop talking now.

MR. SHUSTER: So, our burden, as we understand it in this estimation proceeding, is to show that at trial we could prove our claims. I think that's the standard in an estimation proceeding, and the parties agree that that's the ultimate goal here. So, we were never going to...

So, what we did is we provided the evidence, both the actual evidence and a summary of the evidence, that we would use to prove our breaches, and that we could use here

to show the Court that we have evidence to prove our breaches. Which is why I start out by saying that we provide breach by breach evidence. We provided that to the plan administrator.

One way the Court can look at whether we have carried our burden, so to speak, is the plan administrator did not, on an evidentiary level rebut our evidence, except in total in perhaps seven percent of cases. How do we know that? Because Mr. Aronoff, among other things... Well, there's a couple ways we know that.

Let me start with Mr. Aronoff. He provided in his spreadsheet in Exhibit 15 a column, was there a particularized response from the plan administrator? In other words, did it provide an evidentiary rebuttal to the breach descriptions and the and descriptions of the evidence that the Trustees provided. The plan administrator did so in only seven percent of cases. So, that's in Aronoff Exhibit 15.

If it had, if the plan administrator had evidence to negate the evidence that we had that we described, that we expressly and specifically referred to, it would've come forward with that evidence. How did --

THE COURT: Well, hold on. Let's just take a simple example, a missing documents loan. There's a missing till. Okay?

MR. SHUSTER: Okay.

THE COURT: Mr. Aronoff testified that he didn't poke around in the loan files. Okay? So, why is it that you think on a missing documents claim that when the Trustees say there's a missing till, and now you presented evidence where the person who I suppose I should look to as the person who lays the foundation for my admitting that evidence, says we didn't give the loan review firms specific written instructions, they're good at this, they knew what they were doing, they came out with an answer on a particular loan file, we QC'd it but we didn't poke around in the loan files. That was QC1. Then QC2 was we just looked to see whether the description of what came out of QC1 was accurate.

Why is it that you think that the plan administrator at that point has the burden of going into the loan file and poking around and finding a missing till? Or alternatively, there has been no proof of the history of the life of the loan file. There has been no proof that for this particular pool, they were digitized at this particular time, in this particular way, according to these parameters, et cetera. So, I've got all these gaps. And moreover, how am I supposed -- literally, I'm supposed to go through every loan file myself?

MR. SHUSTER: Well, certainly not. I mean, that's

not possible. That wasn't possible in these proceedings, which is part of the reason that we're relying on summary evidence. I mean, it would not be possible in an estimation hearing to go through all of the evidence --

THE COURT: But that's not -- but the fact that there are a lot of loans, and even more breaches, cannot be used to justify the use of a summary as a way of satisfying a burden of proof in and of itself.

MR. SHUSTER: Well --

THE COURT: You can't just say there's a lot of files and a lot of breaches, of course you can't go through all of them, aha, we have a summary, without connecting the summary to the evidence.

MR. SHUSTER: Well, the summary is a -- I want to take the example that Your Honor gave, and then I want to come to the bigger point. On the example, why is it their burden? It's what they said they did. They said they went through every loan file.

Mr. Trumpp testified here under oath, we went through every loan file completely. We consulted third-party sources where necessary. I specifically asked him, did you hold back any evidence for steps 4 and 5 of the protocol, and he said no. The only thing to conclude for that is that when they had rebuttal evidence, they provided it.

But we start with our showing that we have the evidence. That's what we gave them in the protocol. That's what we provided the Court here. The Court can look at our descriptions. The Court's not going to look at every one of 105,000 breach descriptions, clearly.

But the Court can look at any one of our narratives, any one, and know exactly what evidence we're relying upon, exactly what representation we're relying upon, and exactly what breach we're asserting. The Court cannot look at the plan administrator's responses and know what evidence the plan administrator is relying upon to rebut our evidence.

So, we have breach descriptions that describe the evidence. The evidence is there. That's not even seriously contested. For all the talk about our process and the so-called fundamental flaws in our process, on the borrower breaches when we say there is an affirmative piece of evidence that we're relying upon, it's a tax return, it's a W-2, it's a credit report, it's a MERS report; here's what it says, that is inconsistent; here's what the borrower said, here's what this piece of evidence is, and here's what it said. It's not even seriously contested that that information that we provided was accurate. That's enough to show the Court that we can prove the breaches. The Court may not --

THE COURT: You don't think it's seriously contested that what you provided is accurate? There was witness after witness where the plan administrator introduced evidence or elicited testimony on cross-examination that showed flaws with the use of BLS, flaws with the VOEs, flaws with determination from supporting third-party documents, levels of income, et cetera. So, I don't know how you can... I just don't understand that characterization of the evidence.

MR. SHUSTER: So, what I'm saying, and I said this at the beginning, that they wouldn't be able to show otherwise. First, when we say -- it simply is the case that when we say the borrower said his or her debts were $100,000, a MERS report shows an undisclosed mortgage of $400,000, those facts that we stated are accurate. And the MERS report says what we said it says. The income tax form says what we said it says.

So, that's why I'm focused in part on the fact that we didn't get specific responses saying, no, that's not true, or that's not sufficient, or other evidence -- except in seven percent of the cases. We just didn't. And the testimony -- based on Mr. Trumpp's testimony here, he said they looked through everything, they held back nothing in the protocol process.

The only inference to be drawn from that is they

didn't have contrary evidence. If they had had it, they would have cited to it. And they did cite to it, seven percent of the time. The rest of the time, it went unrebutted. That's a showing by us in our respectful view that we could prove at trial that there are breaches, that we have evidence, that our process in fact was good --

THE COURT: Then why were there the withdrawn claims?

MR. SHUSTER: So, the withdrawn claims. First the withdrawn claims are overwhelmingly... As Mr. Grice showed, the withdrawn claims are overwhelmingly and missing documents in the compliance categories. I understand that chart was shown yesterday. I'll show it today.

So, even on missing documents and compliance breaches, for the most part it wasn't shown that the document wasn't missing. A couple -- one instance, I think, one exemplar was shown. But it wasn't shown the document wasn't missing. The arguments were made that it wasn't necessary for it to be retained, or you can't be sure that it wasn't there at the beginning, and so forth.

THE COURT: Oh, Mr. Morrow's view was that if it's not in the loan file, it never was.

MR. SHUSTER: Yes.

THE COURT: That's based on nothing.

MR. SHUSTER: Right. Well --

THE COURT: That's based on nothing. That's not based on firsthand knowledge. That's his rule.

MR. SHUSTER: Right.

THE COURT: That's his assumption. So --

MR. SHUSTER: So, that was --

THE COURT: So how do I -- you have missing documents claims left. You've provided no explanation as to why some missing documents claims made it through the gauntlet and others didn't. So what am -- I mean, it has to be more than take my word for it.

MR. SHUSTER: So, on missing documents, just to finish the point. I'll come to Mr. Morrow --

THE COURT: Yeah.

MR. SHUSTER: -- in a moment. To finish the point on withdrawn loans, even Mr. Grice said, "I don't know what conclusions to draw from that." He didn't offer an opinion. At the end of the day, he did not offer an opinion, what it meant that there were withdrawn claims. He didn't. All he said was the process is changing, therefore it's unreliable. But in that same paragraph of testimony, he goes on to say, "I don't know what conclusions to draw from that. I just don't know what that means." So, there's no affirmative opinion from the other side.

THE COURT: There couldn't be. You refused to characterize or shed any light on the reasons for the

withdrawal of the claims other than saying that we still think they were good, we just chose not to go forward with them. Mr. Aronoff didn't know about it. You know, when he got to the ballgame, he started at second base. So --

MR. SHUSTER: So, the fact remains, on the missing document claims, the Court may have questions about whether the missing documents were missing at the time, or you know, whether the claim constitutes a breach of the rep. But, you know, we are here on the claims and breaches that remain, and there again, what we rely on is the breach descriptions and the responses that we got.

Now, I'm not saying that the Court, you know, won't have any doubts on any of the missing document claims. The missing document claims presents some thornier issues that the borrower breaches don't present, because on the borrower breaches we're talking about, you know, verifying a few data points --

THE COURT: Right.

MR. SHUSTER: -- and affirmative evidence. So, there's a difference. So, that's how I would respond that. So, that's where we are. I want to say, by the way, on the subject of defending the breaches, it's not the plan administrator's fault. We're not assailing the plan administrator. This was the hand the plan administrator was dealt. It doesn't have people who originated the loans.

The evidence is what it is, and the plan administrator and its counsel are doing the best to defend the claims with what they have. So, you know, that's where we are on that.

So, we do have Mr. Morrow. Whatever the Court thinks about Mr. Morrow's opinion on the missing document breaches, he did do an independent check on all of the breaches, including large numbers of the borrower breaches, what we call the big four breaches.

THE COURT: But, Mr. Shuster -- and you know what I'm going to say, because I've said it before -- Mr. Morrow was handed a bunch of loan files and knew the answer before he lifted his pencil to do anything. He was not given a bunch of loan files and said, tell me which ones have breaches and tell me which ones don't. So --

MR. SHUSTER: So, I'll say two things --

THE COURT: You know, I don't want -- you know, this is a court of law.

MR. SHUSTER: Yes.

THE COURT: It's not a scientific laboratory. But there is something to having a process in which the person being asked for an answer doesn't know the answer ahead of time. And I distinguish it from a situation that I get all the time, which is two sets of combatants are trying to convince the Court as to evaluation of assets, for example. One expert is hired to come up with as high a number as

possible, and the other one is hired to come up with as low a number as possible. But in that situation, they have to show their work and a decision can be made.

But here, the notion that giving him this pool of loans, which I understand were selected by another expert as random, how does that help?

MR. SHUSTER: Well, I'll answer that a couple ways.

THE COURT: Okay.

MR. SHUSTER: One, you know, Mr. Grice did the same thing, but said that what he did was independent. But he did the exact same thing.

THE COURT: I might have --

MR. SHUSTER: I know --

THE COURT: I make the same observation --

MR. SHUSTER: Okay, so I --

THE COURT: -- about Mr. Grice.

MR. SHUSTER: Right. But I note that Mr. Grice said -- took a sample of loans, not randomly selected by a statistician whose credentials were not challenged -- he took a sample of loans. I've reviewed these. I am independent. I am an auditor. You can -- right?

THE COURT: I agree with you.

MR. SHUSTER: So, what Mr. Morrow did, at a minimum, is the mirror image of that, but it's at least more

empirical in that his sample was randomly selected by someone else who has the expertise to do that. We were not presented -- if we wanted to present to the Court a breach rate from scratch, then we could have pulled the sample from the entire population of loans in the securitizations, had a random sample, had Morrow review that, and come up with a breach rate and say that's the breach rate. That's not what we did.

But, because we did a review, we did a review that ruled out 77,000 loans to begin with. Almost half the loans. So, there is a check right there. You know, there is a check right there. I mean, the Trustees -- almost one out of every two files they reviewed, they did not put forward as breaching, for whatever reason. Lack of evidence, they could affirmative...

So, Morrow was given as a check to, you know, to what extent he agreed. You can evaluate Mr. Morrow's credibility and whether he was going to sit there and say what he thought the answer was supposed to be or come to his own conclusions. He disagreed seven percent of the time.

That happens to correspond pretty much exactly with the rate at which the plan administrator provides specific evidentiary rebuttals to the breach assertions. That suggests something. Is it perfect? No.

The Court also, despite the testimony of Mr.

Morrow or Mr. Aronoff, the Court might say, you may think sine category of evidence is good enough; I don't. You may think some type of breach is good enough; I don't. You may think some, you know, magnitude of breach is good enough; I don't. That's why we're presenting the calculator tool, because we think that enables the Court to make those judgments. The Court still has discretion and judgment to exercise about what it's prepared to accept.

But that's what Mr. Morrow was asked to do. He's been in the business an awful long time. He's a true mortgage guy, not like Mr. Grice, who is a banking consultant who did some mortgage stuff, and he's originated loans and underwritten loans, and defended his opinions. And you know, that's all we can offer is the evidence, a description of the evidence, an expert who described the process and presents the evidence, another expert who provides a check on the evidence, and then we have two more things.

We have the fact that for most types of evidence we are relying upon, other courts have accepted that evidence. And I think, very importantly, Lehman and Aurora pre and post-plan confirmation, relied on the same types of evidence to prove the same types of claims. That has to matter. That is evidence of industry practice from one of the biggest, if not the biggest industry participant. I'm

going to come to that a little later.

So, that's what we have on evidence of breach. So, on adverse and material effect, we're relying first and foremost on the language of the documents. The documents say a material and adverse effect on the value of the loan. The plan administrator is now reading that say a breach that caused the loan to default. Those are important words to read into a contract. If the parties wanted to elucidate that standard, they knew how to do it. Lawyers know how to, you know, put in those requirements. They didn't. That's an awful lot of meaning to read into the words that are actually there.

So, again, we provided experts, Aronoff and Morrow, who testified to the extent that term is viewed as a term of art in the industry, the custom and practice of the industry is to look at that as an increase in risk that diminishes the value of the loan. That's what they testified to.

That's the same standard that the courts have accepted. All the courts. The monoline courts, the non-monoline courts. They've all accepted that standard. No court that I'm aware of has looked at the language and read it to mean what the plan administrator says here.

THE COURT: Okay. But there's a lot of daylight between not accepting what the plan administrator says,

which is, as you've put it, reading in the requirement that there be a default. And what Mr. Aronoff did, which was -- and he confirmed this on the witness stand -- there was not a single instance in which he found a material breach where he did not find an adverse material effect. When he found a material breach, there was an adverse material effect. So, he wrote out the language from the MLSAAs that said that materially and adversely affects the value of the loan.

So, I could entirely agree with you, and there's a lot of support in the case law for the notion that there doesn't have to be a default. There's a more nuanced question about what's now come to be called the seasoning of the loans, as to whether or not that counter act or offset an adverse effect that may have existed at a certain time.

But you put up a slide with Mr. Aronoff, and it's crystal clear that in effect, for Mr. Aronoff every material breach is a deemed AMA. And that's not what the documents say. And the only thing that I have that explains his view on that is that Judge Castel was wrong.

MR. SHUSTER: Well --

THE COURT: I mean, that's kind of the basis -- or not the basis, but something that he says in support of his view.

MR. SHUSTER: So, I respectfully disagree that he read it out of the agreement what -- in the case of the

borrower breaches, it happens that the same evidence goes to both standards, for the most part. So, the AMA requirement applies to a wide array of breaches that are in the securitization documents.

THE COURT: Right.

MR. SHUSTER: Two borrower breaches and all kinds of other breaches --

THE COURT: Absolutely.

MR. SHUSTER: -- where there may be a more pertinent question as to whether there's an AMA. But effectively, when a borrower, you know -- it's the same evidence. It’s a misrepresentation of income. That's what breaches the no untrue statement rep or the no-default rep that's predicated on the borrower covenant, and the same is true for the few other categories of borrower breaches. It's just the same evidence. And how do we know that independent of Mr. Aronoff?

And even independent -- first, Judge Castel did say that when there is a misrepresentation of those types, that has an impact on the risk of the loan, which is a diminution in value, and that impact continues. And he also found that where you can infer intent, that that's, you know, inherently a -- has an adverse and material effect. And he infers that based on the magnitudes of the breaches. And here, the magnitudes of the breaches that we're

asserting are substantial. Ninety percent of the income breaches are over 30 percent. Similar numbers, I think, 80 or 90 percent of the debt breaches are over $30,000.

So, the Court certainly can infer intent as that construct is used in that case. But then again, we have the Lehman and Aurora admissions. And those aren't just -- they don't merely -- although it's highly significant that they do -- they don't merely adopt our standard, adopt it. They used it before we used it.

They said, in sworn declarations submitted to courts in the United States for purposes of gaining judicial relief, when a borrower misrepresents his or her income or debts or occupancy, that has a material and adverse effect on the value of the loan, because the loan cannot be sold to another purchaser or into a securitization except at a discount.

That's not only the enunciation of a standard, it's also a statement of a market fact. It's a statement of a market fact. A misrepresentation of income, debt and occupancy diminishes the value of the loan. And Mr. Trumpp conceded that's not curable. And he also conceded you wouldn't even make a loan to somebody who misrepresented income or debt or occupancy.

So, that's how, you know, to the extent -- that's how the evidence -- that's why the evidence --

THE COURT: Did you put on testimony that there was on a loan by loan basis a comparison of the loan to the underwriting guidelines, so that you could affirmatively prove that the loan would not of been made because the appraisal didn't have a picture of, you know, the swimming pool?

MR. SHUSTER: No, but that's for purposes of meeting the materiality standard at the rep level, right, of the rep and warranty?

THE COURT: No, I'm talking about you have an appraisal that's not a qualified appraisal because it's missing a picture. Okay? It's a breach, right? Is it a breach that adversely and materially affects the value of the loan? I don't know. How do you -- I mean, without -- if one formulation of that standard -- which I don't know which one you're picking -- but if one formulation of that standard is you wouldn't have made the loan if you knew that that picture of the swimming pool was missing, well, without checking the underwriting guidelines, how do you know?

MR. SHUSTER: We don't take on that burden. We don't have to take on that burden, as a matter of law. The courts -- you know, that's not the language of the representation. It's not the way the courts have viewed it. And it's certainly not the way the Defendants, who are effectively the Defendants, Lehman and Aurora, viewed it --

THE COURT: But let me go back to the present tense use of the word, because I just don't understand this. And I know at trial, I gave this example. If you have a loan that's been performing for 10 years, notwithstanding the fact that we know there wasn't a qualified appraisal in the file, is it your position that you win on that loan file, where you have performance for 10 years, never late, no defaults --

MR. SHUSTER: So, I'll say --

THE COURT: -- that that breach -- you believe that that breach materially and adversely affects the value of the loan at the time the trust is seeking to put it back?

MR. SHUSTER: So, I'll give two responses to that.

THE COURT: Sure.

MR. SHUSTER: One, that scenario is very, very much the exception rather than the rule here. Two --

THE COURT: I'm not suggesting that it is the rule. I'd like to use an extreme example in order to --

MR. SHUSTER: So, yes, I would continue to assert that even there, where there was a material, you know, misrepresentation or omission, that there is a breach and that it had an adverse and material effect. It's not the same loan. The loan would have had different terms. To say that that loan that was made, based --

THE COURT: You just told me you didn't check the

underwriting guidelines, so how can you --

MR. SHUSTER: Because --

THE COURT: How --

MR. SHUSTER: Well, what I'm relying on his expert testimony, Judge Castel's observations, and Lehman and Aurora's own observations, and Mr. Trumpp's sworn testimony. He said -- I asked him, and he said it would have a lower value or a higher interest rate. That's the answer. So, it wouldn't have been the same loan.

So, you know, that really is our position. And again, I'm doing this by way of introduction to our slides, but that's our position.

[LAUGHTER]

That's our position on adverse --

THE COURT: I didn't give you my standard rep and warranty that I immediately breached yesterday --

MR. SHUSTER: No, no, no, no, no. I --

THE COURT: -- about trying not to talk.

MR. SHUSTER: I much --

THE COURT: But I am now going to --

MR. SHUSTER: -- much prefer --

THE COURT: No, but I have time constraints, so I am now going to try not to talk.

MR. SHUSTER: I'd rather be interrupted and addressed the points that --

THE COURT: Well, I'd rather -- I'll let you get to your presentation because I do have time constraints today, so...

MR. SHUSTER: Okay. And look, if I -- I can also race through --

THE COURT: Don't race.

MR. SHUSTER: -- the slides, but I do want to make sure --

THE COURT: Sure.

MR. SHUSTER: -- we address the points that the Court is most concerned with. So, I want to address the on hold loans. The plan administrator did not review the on hold loans. It is in no position to contest the evidence that was provided on the on hold loans, could have reviewed the on hold loans. Mr. Grice reviewed some on hold loans. And to now say that the on hold loans, which comprise $3.2 billion of value should be wiped out, that is the -- seeking the most aggressive possible remedy that would only be imposed where there was the most egregious possible conduct.

Even if we had intentionally destroyed documents, there would still need to be a showing of prejudice, and that the remedy is proportionate to the prejudice. That's now the standard under Rule 37. So, that's our position on the on hold loans.

On purchase price, I'll get into it in the slides,

which will be no surprise to the Court, our view is that Dr. Snow correctly calculated the purchase price. And so if, all of that being said, then we come to an estimation methodology. So, I said at the outset in my opening that we believe the estimation methodology ought to be something that's tethered to the evidence and predicated on the evidence, and the Court can make -- can resolve disputes across groups of loans of the type that I described earlier, certain types of breaches, certain types of evidence, magnitudes of breaches, and so forth.

And further, you know, we've provided an agree rate that on one side is a narrow rate, right, of seven percent. We have the plan administrator's. So, we think those are all metrics and methods that the Court can use to arrive at an estimation that the Court is comfortable really reflects the value of the claims based on the evidence the Court have seen.

We respectfully submit that the methodology that the plan administrator is proposing is not a methodology, because first, to the extent it relies upon settlements reached in other courtrooms, in other matters, that we submit, as we said in our brief, the Court should decide this case based on the evidence that was presented in this courtroom, not in other courtrooms.

THE COURT: But you all agreed. You all agreed

what evidence was admissible in this courtroom.

MR. SHUSTER: And I'm not suggesting the evidence is inadmissible. I'm doing the same thing the plan administrator is doing. It agreed all our evidence is admissible, and then it's making arguments about probative value, weight --

THE COURT: Right.

MR. SHUSTER: -- creditability. So, I --

THE COURT: But you're suggesting that somehow reliance on the comparable settlements or the 2015 settlement is not as legitimate as reliance on the Aronoff exhibits.

MR. SHUSTER: What we're suggesting is that, in truth, is far less likely to yield an accurate estimation of these claims than the evidence and arguments on these claims. That's essentially what we're saying. They're not true comparables because they were -- though settlements were all in cases -- three out of the four were before there was any litigation, before there were loan reviews.

Mr. Fischel, Professor Fischel, acknowledged that large percentages of those trusts' claims were subject to statute of limitations defenses that are not present here. Even he said that caution -- in his report, that caution should be exercised in applying those things as comparable settlements because this is not a settlement, as such, which

it's not. We settled on a process. We settled on the admissibility of certain types of evidence. We didn't settle on a number. The Trustees have not settled on a number. So, to look at settlements elsewhere, I don't -- I respectfully submit is not going to reliably lead the Court to an accurate estimation of these claims.

And then, to the extent that the plan administrator relies on the 2015 settlement, it really suffers from some of the same infirmities. It was reached before the evidence was presented. The institutional investors didn't see the evidence. They haven't come into this court to explain their thinking or what methodology they used. In fact, they --

THE COURT: So, those institutional investors, who manage trillions of dollars, they just picked a number out of a hat, well let's hope it works out? It defies logic, common sense, and commercial practice to take the position that those institutions, acting to protect their own interests, they make a wrong call by a country mile by settling a case at a 10 percent recovery, where, gee, had the only thought about it more or done more due diligence, they could have gotten a 50 cent recovery? They're not going to be in business very long.

So, it is not convincing to me the hypothesis that had they only been smarter, had the only done more work,

they wouldn't have settled at those levels. It just defies the reality of the way things work on Wall Street.

MR. SHUSTER: Well, I'll say this --

THE COURT: I mean, not that you're not that good. You're that good, okay? So, but the suggestion is that had the only going to trial -- but they would have thought of that. It didn't not occur to them.

MR. SHUSTER: Well, I will say this. One, I'm not saying that if they'd only been smarter, they would have done something else. They assessed their own self-interest and did what they did. We don't know what their -- first of all, they're smart. They're not infallible.

THE COURT: Sure.

MR. SHUSTER: I mean, those funds make mistakes and lose people billions of dollars all the time.

THE COURT: Sure.

MR. SHUSTER: So, they're far from infallible. And that group, whatever the dynamics of that group, which is a quarter of all the certificate holders who are out there, for whatever their dynamics and internal agreements were, and their decision-making process, they decided at that time --

THE COURT: There was no evidence presented. Judge Smith didn't present any evidence. There was no analysis of why that group, you know, somehow wasn't

represented to. I mean, there were slides put up about where the holdings work, et cetera, et cetera. But there was no evidence put up as to why their view should be disqualified as being not representive that they were in particular trusts that have particular, you know, warts and problems, et cetera, et cetera. So --

MR. SHUSTER: They were in a position to make themselves unofficially representative by directing the Trustees and taking on those responsibilities. They had those reps under the documents. They didn't do it. So, they could have. They could have put themselves --

THE COURT: Well, now I think we're getting into something that we really shouldn't talk about.

MR. SHUSTER: Okay.

THE COURT: It goes beyond the scope of anything that was presented.

MR. SHUSTER: But the fact is that they were looking at -- they came to a number with the plan administrator before seeing all of the evidence, before seeing any of the evidence. They had the opportunity to come into this courtroom and explain themselves. They traded that away in order for the objectors not to come in and explain themselves. So, the Court -- I mean, there's not really any evidence of what the institutional investors did or thought, or whether they were smarter not, or they

actually used --

THE COURT: No, the only --

MR. SHUSTER: -- models or didn't.

THE COURT: The only fact in evidence is that they agreed to that number.

MR. SHUSTER: But it's also a fact that the Trustees, who had more information and who are responsible to the entire population of certificate holders, did not.

THE COURT: Yeah, but you chose not to share your thinking.

MR. SHUSTER: But our thinking -- in fairness, our thinking is attorney-client privileged just the way the plan administrator doesn't come forward and say, "Let me explain, you know, what was our thinking." The plan administrator in the protocol process said $300,000,000 of claims are good. Now they're urging the Court to estimate the claims at eight times that number. There's got to be some thinking there, you know, advised by counsel and so forth. The Court doesn't know what that thinking is because it's attorney-client privileged. It's work product. And the -- that's why the Trustees aren't going to come forward and reveal whatever decisions they made that are based at least in part probably on attorney-client advice and work product. But the Court can equally infer from the Trustees' rejection of the offer that the Trustees believed it was inadequate.

That's just as valid an inference made on the same basis and the same amount of evidence --

THE COURT: I can't -- I cannot come to that conclusion. I can't come to that conclusion. I can come up with several alternative hypotheses for why the Trustees rejected it but as you just said, and I agree with you, I cannot go there. I do not know. So, I cannot infer that they concluded that it was inadequate. There could be a host of other reasons why that settlement did not go forward. So, it would be improper for me to draw that inference because I have -- all I know is that there was a settlement and it didn't go forward. That's it.

MR. SHUSTER: But that is certainly the same -- the same can be said about the settlement reached by the institutional investors. No more is known. It's an equally blank slate. I -- you know, it's what a number --

THE COURT: Okay. Well, we're -- maybe for the first time in an hour we're in agreement.

MR. SHUSTER: Okay. Well, I'll leave it there. So -- I definitely will leave it there. So -- and then Dr. Cornell -- you know, Dr. Cornell is over-qualified to do what he did which was basic math. He was given -- you know, he was given percentages. Assume -- you know, assume these various discounts and -- which, you know, weren't explained to him.

THE COURT: Well, it's not discount. Success rate.

MR. SHUSTER: Success rates. But -- right. But net, you know, when you get down to it assume that the claims fail about 80 percent of the time.

THE COURT: Right. But it was -- but then I have Mr. Aronoff who told me that every single one of his claims -- I -- was going to win. Well, I've never had a litigation, right, where one of the parties says, "I am 100 percent right on 100 percent of every aspect of my claim." So, that's not helpful either.

MR. SHUSTER: Well, it --

THE COURT: You yourself -- we've seen mistakes. We've seen flaws. We've seen evidence that doesn't stand up. So, that statement that I'm right 100 percent of the time is incredible. It -- I cannot credit that opinion that he has given about how good his own work was because there's been evidence that demonstrates it's not 100 percent.

MR. SHUSTER: Well, he said that it's his opinion that all the breaches are valid. He did acknowledge that there are going to be arrows, and Morrow acknowledged that there are going to be errors. It's loan re-underwriting. I mean, it's -- on the one hand, it's not rocket science. But on the other hand it's painstaking, you know, piecework and there are going to be mistakes. Mr. Grice said he made

mistakes and he reviewed 1800 loans over two months. Trustees reviewed 105 -- you know, 171,000 loans over 10 months, I think. There were mistakes.

So, Mr. Aronoff acknowledged that there were mistakes which is effectively acknowledging that not every one of the breaches at the end of the day is going to be born out, but the other side has to show that with evidence. Based on the evidence he saw, the process he knew, the evidentiary sources that were relied upon, the process as he understood it, it was his view that prima facie every one of the breaches was good. But he acknowledged that he was not -- that the process would not be infallible.

So -- but that's different from Mr. Cornell -- Dr. Cornell just getting, you know, success rates --

THE COURT: He was given assumptions and applied them.

MR. SHUSTER: -- and saying -- right. So, that completes my overview. Happy to keep going now or --

THE COURT: I'm happy to keep going.

MR. SHUSTER: Sure.

THE COURT: If there's a sense that we need to take a break, someone should let me know but we otherwise should keep going.

MR. SHUSTER: Okay. So, we have decks, slides to beat the band. So, I -- let's leave it there for a moment.

I'm pulling back to -- how much time do I have? Another hour?

THE COURT: At noon. You have until noon and then I have to take a conference call for 15 minutes. And then there's going to be no more than a half an hour rebuttal and no more than 15 minutes of sur-rebuttal. That was what Mr. Goldberg negotiated in your absence.

MR. SHUSTER: Sounds good. Thank you, Your Honor. So, I just want to pull back because -- and look at, you know, this period in -- we've had testimony about the careful process for Mr. Grice, among others, the careful process between the broker and the borrower and, you know, making this careful effort to get it right. That's not what the market was doing in that period of time. And that's not what, frankly, Lehman and Aurora were doing in that period of time, either. So, I'm starting with the report of the Financial Crisis Inquiry Commission to Congress, commissioned by Congress, reporting to Congress. The Court can certainly take judicial notice of it. I'm not going to dwell on it but I just want to show a couple of findings if we could on Slide 4.

So, there were findings of systemic breakdowns in the mortgage origination market. There were findings that a significant percentage of the sampled loans did meet originator's own standards or the standards of the

investment banks that securitized the loans, and nonetheless they sold the securities to investors. So -- and here we have a little bit more. The significance of this, among other things, is to show that the loan application isn't entitled to particular and certainly not any disproportionate deference because in that period of time the -- there are widespread deficiencies and breakdowns in origination practices. And as some congressional testimony showed, originators invented information, occupations and income and so forth. And --

THE COURT: You're painting with a very broad brush here.

MR. SHUSTER: Yes. But I'm going to show it also out of the mouths of Lehman and Aurora and its own borrowers, the borrowers on loans that are at issue here.

THE COURT: But I just -- as you've started out by telling me and I thoroughly agree with you, what I decide has to be based on evidence, okay? Yes, I can take judicial notice of this and of the fact there was this big financial crisis, but what we have is loans that were originated over a period of time. So, even if I were to focus in on this sweeping characterization of what everybody agrees was, you know, not a great thing, right, you would have to go back and look at what we have and look at the loans that originated in 2001 and 2002 and 2003, 2004, and do some

serious analysis of when this stuff kicked in.

Sure, there was a point where the hunger for these loans, you know, exceeded the available food supply, right, so all of this started to happen even more. I have no idea what was going on -- you know, how to correlate what was going on when. So, I take your general point. I don't disagree with your general point. I just don't know -- it's a useful device on your part to remind me that this was overall not a good thing that we hope never happens again.

MR. SHUSTER: And you know, the -- I think all of the loans here were originated in the run-up to the mortgage crisis. I mean, overwhelmingly it was --

THE COURT: Right, but they were -- there's 2002, 2003, right? So --

MR. SHUSTER: Yes. Most of them -- most of these securitizations are from '05 to '07.

THE COURT: There are a lot of '05, '06, '07. Yes, you're right.

MR. SHUSTER: Yeah. So, Lehman had an originate-to-distribute model which enabled it to get the loans off of its own books. You know, that model was itself found to encourage shoddiness and undermine responsibility. Lehman was a, you know, huge player in the market obviously. And, you know, we have evidence -- we only have a handful of Lehman and Aurora documents. We either got the documents

because they were made public by the examiner or we found them on the -- back up one -- we found them on the dockets of the -- you know, the public docket. So, this just shows generally that Lehman had a preeminent role in the market.

This was an article that was on Slide 8 that was relied upon by Dr. Cornell. I think it was shown to him by Mr. Heidlage. And, you know, it shows that even among poor performers in some respects Lehman was an outlier and this is -- goes to the asset categories here or the breach types or occupancy and undisclosed second liens by borrowers. And then in their own internal documents -- and again, we only have a tiny handful -- but for example we have on Slide 9 from February of '07 an internal comparison of LXS and many of the securitizations here are off the LXS shelf compared to countrywide and the highlighted language says the -- if you look at the comparison we have a substantial data set. The performance has worsened versus our largest competitor. The bucket is not only worse than countrywide but underperforms the aggregate sub-prime market. And we are creating worse performance than sub-prime while the rating agencies assume our performance should be substantially better. That's obviously troubling.

And then on the next slide there's more internal acknowledgement that Aurora is originating risky loans and that it's originating its riskiest loans ever when the rest

of the industry is pulling back, which suggests --

THE COURT: Okay. But again this goes to -- yeah, it's a Lehman document.

MR. SHUSTER: Yeah.

THE COURT: The story is ugly. But you're not presenting me with any evidence of which loans that Aurora originated in the last four months are at issue here.

MR. SHUSTER: Well, the --

THE COURT: so, that would be -- you know, if 90 percent of the loan that I'm trying to figure out were --

MR. SHUSTER: Well, yeah. I -- the -- Slide 9 talks about all of '06 production and Slide 10 then goes to '07 production. And then we have on Slide 11 -- the -- Slide 11 then is an internal risk review, Aurora and BNC, and Aurora and BNC are the Lehman loan origination affiliates that originated the overwhelming number of loans here. And they say that Special Investigations, which is a unit within Aurora, completed a review of 240 LXS loans and half the loans have material misrepresentations and that the trading desk asked for a review of more loans. This will result in even higher repurchase volume.

There is -- you know, there's -- that's a fair amount of evidence considering that it's -- these are snapshots that, you know, there was trouble in paradise. Let's put it that way.

THE COURT: But again -- it's a snapshot but it's the -- you know, it's the child seeing the painting at his eye-level and, you know, seeing one tiny thing and there's a whole elephant.

MR. SHUSTER: Yes.

THE COURT: So, that's great but it doesn't -- you know, this gets back to the whole issue of going from a small thing and extrapolating to a large thing.

MR. SHUSTER: Well, part of what all of this is intended to show -- a couple of things. One is that there -- you know, there was testimony by both Mr. Trumpp and Mr. Grice about the loan origination process and this careful process between the broker and the borrower. And, you know, there wasn't much behind that. And I'm suggesting based on this that there's nothing behind that. There's no evidence to support that in the record and there's no evidence that would suggest that the loan applications should be given the benefit of the doubt, certainly not coming out of this time period and certainly not coming from these originations. That's, you know, a big part of why we're --

THE COURT: And again, I -- not -- I don't want to belabor the point.

MR. SHUSTER: Yeah. Understood.

THE COURT: You've shown me a very narrow slice from 2007 where things you just got done telling me had

gotten to a point that was worse ever. It has -- says nothing about what happened in 2002, 2003, 2004 or -- I mean, what you're suggesting is that there were lots of originators out there, right? It wasn't just Aurora. There were lots of what I would call Mom and Pop originators. And what you're suggesting to me is they were all doing the same thing. And I actually don't believe that. I do not believe that around the country where folks were originating loans that they set out to engage in a shoddy process and that they set out to purposefully make loans that -- you know, to folks that they knew were lying or that they misled them into it. Did that happen? I'm sure it did. But --

MR. SHUSTER: Well, it had to have happened on a massive scale. And at least the report to congress says it did. I mean, it says it was systemic. I mean, those were the findings. I'm not suggesting -- I don't know, but when we talk about Mom and Pops, so Aurora had its own loan origination. It had core respondents. It had its wholesale network. There were a lot of people. All I can show the Court is its own internal evidence saying we're -- our production is worse than countrywide's for '06. Our production in '07 is very bad. We've reviewed half -- you know, a sampling --

THE COURT: Okay. But I can't -- you know, but I can't decide this case based on the fact that this was

really bad, Lehman and its affiliate were bad actors, therefore you win. I mean, that's just not --

MR. SHUSTER: I'm not asking for that. I'm very content --

THE COURT: -- you know, and a conclusion -- the opposite conclusion is not going to constitute, you know, a benediction that, you know, whatever happened happened. This is about a case with -- you know, with a damage claim and that has a burden of proof requirement. So --

MR. SHUSTER: Yes. No, look, we're content to rely on the specific, you know --

THE COURT: Well, we have to.

MR. SHUSTER: -- case-specific evidence that we presented. But they did present an expert who said, "You've got to give the loan application the benefit of the doubt because of this careful process." He didn't support that with anything. He didn't look at Aurora's loan origination practices. He admits that. He didn't look at their policies and procedures. He made no effort to verify that. I have internal documents from Aurora that suggest strongly otherwise. We've got other findings that suggest otherwise. And I think that Mr. Grice's opinion on the deference or, you know, credence that should be accorded the loan application is not worth very much. That's what I'm suggesting.

THE COURT: Okay.

MR. SHUSTER: So, then we have the borrower's own words from the loan files that are in evidence that -- not -- again, are intended to provide a sense of context and a window into the practices that were engaged in at the time. So, "When the original loan was given they took my fiancé's income and added it to mine so it looked like I made a lot of money." That's from a hardship letter. "One form said the home would be our primary residence. We said that's not true." The young woman said, "You mean to tell me there's absolutely no possibility you'd ever move into the house for even a week?" Here, "This loan was a stated income loan. The mortgage broker was aware I was unable to work at the time due to medical reasons. We were told not to worry about that."

I just have a couple more and then we'll move past this. "I came across my financial information where she inputted that I make $7750 a month. I do not make close to this amount as the financial information I have provided proves." Therefore, this -- and so forth. So, there's a whole series of these. We can just proceed.

The BNC -- right? That's okay. No, I meant to run through the entire -- we've got --

THE COURT: But what am I suppose to do with that? What am I supposed to do with that?

MR. SHUSTER: This is context. That's all it is. It's context and it does -- you know, it is at least evidence. It's contrary evidence again --

THE COURT: On those loans.

MR. SHUSTER: Well, it's evidence of practices. I mean, between the --

THE COURT: What one loan officer did is not -- does not speak to what another loan officer did. If one loan officer said, "Don't worry about it. I -- don't worry about it. I'm going to give you the loan anyway," okay, it doesn't speak to what another loan officer did. It was happening. I agree with you. It was happening. But what I do with that I just don't know.

MR. SHUSTER: Well, I -- all I can say is that, you know, we went from, you know, industry-wide findings in a congressional report to, you know, evidence that Lehman was a big player in that industry, some indication that it was even an outlier in terms of bad originations, then its own internal --

THE COURT: But Mr. Shuster --

MR. SHUSTER: -- company documents saying that it knows that it's got misrepresentations and bad practices and then borrowers saying that. So, I'm not building a complete case saying, "Rely on this. Don't look at the breach evidence."

THE COURT: But this is kind of extraordinary that on our last day you're putting on a different case from the case that you put on.

MR. SHUSTER: I --

THE COURT: This is an entirely different case.

MR. SHUSTER: Well, I did show this in my opening. I did show some of these in my opening. And I want -- you know, I showed some of this at least to Mr. Trumpp. But I'm not -- it's not a different case. It's context. It's context and it's addressing a specific evidentiary assertion that was made by the plan administrator, that an argument was unsupported but which I want to make sure to negate.

THE COURT: Okay. And that is that the --

MR. SHUSTER: Loan application.

THE COURT: -- loan application should be --

MR. SHUSTER: Right. That's what this all goes to.

THE COURT: Okay. All right.

MR. SHUSTER: So, the standard of proof as the Court well knows is preponderance of the evidence. The Court's very familiar with it.

But, you know, the showing that we have to make here in the estimation hearing and that we'd have to make at trial is that it's more likely than not that we're right and they're wrong and that the scales tip ever so slightly in

our favor.

So, we say that that's largely a matter of common sense. It's certainly a standard that a jury can apply and a trier of fact on a jury can apply, and that here where -- this is a loan that I covered in my opening -- here where the application says that the borrower made $10,750 a month and a 2006 tax return shows $4,050 a month that the tax return reasonably can be believed.

A GAIN service worker is a social worker. GAIN stands for Greater Avenues for Independence. It's a social worker in Los Angeles.

So, we say that it's a common sense standard that when a borrower states in her bankruptcy filing that she lives in New Jersey and works in New Jersey and owns a second home in Las Vegas in her own words that her primary residence is not in that second home.

If (indiscernible) shows the subject debt and other undisclosed debts, the undisclosed debts likely exist. And so forth, that if a borrower states in her bankruptcy filing that her income is $25,000 a year and that's what her tax returns show and that's what her W-2s show, that's probably what her income is. And so forth.

Multiple pieces of evidence are not a requirement under the preponderance of the evidence standard. It's not necessary to prove any -- establish any evidentiary fact

with any particular number of documents. It's about the quality and sufficiency of the evidence. And Courts routinely find breaches in these types of cases based on a single piece of evidence. And on Page 28, Lehman and Aurora routinely asserted breach claims based on a single piece of evidence.

And then, you know, this fleshes out what we were talking about earlier that -- or what I was talking about earlier that the Trustees provided loan-by-loan evidence of breach. This is a typical description on Slide 30 of a breach that the Trustees asserted and their specific description of the evidence, what the borrower's loan application said, what the document that the Trustees are relying upon say -- says, and so forth. And the evidence is what it -- we said it is.

So, Mr. Aronoff did opine that the Trustees' reviews were reasonable and thoughtful and consistent with industry standards. He does have deep experience in all sectors of the mortgage industry: originating, underwriting, securitizing, putting back breach claims -- putting back loans I should say, responding to breach claims and so forth. A

nd indeed, on the subject that the review was reasonable and thoughtful, the Trustees reviewed 171,000 loan files and on 77,000 of them set them aside as not

breaching. That's more loan files than non-breaching loans. That's more loan files than the plan administrator reviewed in total. Those are just the ones we set aside as non-breaching.

So, it is the case that the plan -- that the Trustees' breach evidence was unrebutted in the protocol and on a loan breach-by-breach basis remains so. And as Mr. Trumpp testified, the plan administrator was not holding anything back. So, if it had the evidence, it provided it. And where it didn't, it can reasonably be understood that it didn't have it.

The plan administrator stated -- I think it's in their post-trial brief -- that the Trustees did not address inconsistent information. That's not accurate. First of all, as a matter of practice the loan review firms were instructed to and did review all the information in the loan file and acknowledged in breach descriptions such as the ones that are shown here that there was other information bearing on it but nonetheless the reviewer felt there was a breach. I should also note that --

THE COURT: But Mr. Aronoff was quite clear that once the claim package left the loan reviewer, he didn't go back in and poke around the loan file.

MR. SHUSTER: The loan reviewer did. The loan reviewer did, so --

THE COURT: You didn't put on any loan reviewers.

MR. SHUSTER: No. But he described the process that the loan review firms went through. They were all --

THE COURT: But this conception of quality control.

MR. SHUSTER: But there were two levels at --

THE COURT: Yes, there were two levels.

MR. SHUSTER: -- at the loan review firm before it got to Duff & Phelps.

THE COURT: But Mr. Aronoff was the only one who was in this courtroom telling me about quality control and what he said was his quality control did not involve getting a set of loan files from each of the loan reviewers and doing his own review to see if what made it from the loan file into the claim file was what he thought was correct. That's what quality control is. It's not just taking what you have, right, and verifying that you have what you have. And he -- I mean, there's no dispute about that. And he quite adamantly urged that it was frankly absurd to question what the loan review firms did because this is what they do and they're good at it. And everybody knows that they do what they do and they know what they do. And they were so good at it that we didn't even have to get them all in a room and say, "You're all doing this. We need consistency. Here's a road map."

Nobody did that. Mr. Esses admitted that they didn't do that. Although there was an impression that was made that they were given guidance, they weren't. Everybody -- the Trustees' approach, Duff & Phelps approach, was that we hired these experienced loan review firms and they knew what they were doing. Period.

MR. SHUSTER: Well, there is testimony that they were given some guidance. And, I mean, they were told generally what approach to take. They were told -- they were given breach mapping. They were told certain magnitudes to ignore. There were regular calls with the loan review firms every week. There was a back and forth process. And they saw the results. The loan review firms were good enough not to assert breaches on 77,000 claims. Everything they did was at least subject to some review. They looked at their descriptions of the evidence every time. They made sure that their claims descriptions and the claim package was right. And it turned out it was. It was. The plan --

THE COURT: But if a loan review firm -- if there's a loan file at loan review firm 1 and in that loan file there exists a hardship letter, and for whatever reason the loan reviewer does not decide to include the hardship letter in the claim package, that's just -- that's not something that would have been corrected by the QC1 or QC2

at Duff & Phelps, right? Mr. Aronoff told me, "We didn't go poking around the loan files."

MR. SHUSTER: Well, I will say this -- a couple thins on that. One -- a few things. One, there is no way that the QC could have reviewed every loan file. I mean, that would have taken forever. So, they implemented a spot check process that's different to some degree from the one that the Court is describing. Nobody on the other side -- but the Court doesn't have an --

THE COURT: Mr. Shuster, you know how much I like you, right? Okay. There was no spot check process. There was no -- I agree with you. You could QC until the cows come home. You could have 16 guys redoing what everybody does. But what you just said, a spot check, there was no spot check. Not even one. There was no spot check that crossed the line, Duff & Phelps -- at Duff & Phelps between the claim file and the loan file. Spot check would have been nice. It didn't happen.

MR. SHUSTER: Well, look. I --

THE COURT: No, we don't have to belabor it.

MR. SHUSTER: No. Well, I -- but I want to in a couple of ways. One, this is how experts -- in these cases, this is how they conduct these reviews. And two, it was good enough for the plan administrator. They had the same process with Recovco. Recovco took 45,000 loans. They're a

loan review firm. It's industry practice. They said they did it according to industry practice. They looked at 45,000 files and set it aside. No one reviewed that.

The only time anybody reviewed anything above that was when God forbid Recovco found a potential breach. Then suddenly all the legal talent was put on it and they tried to figure out is there really a breach there. And low and behold, even out of the 20,000-odd files where Recovco said there might be a breach, 12 -- you know, 1000 made it through.

So, that's industry practice. That's what I'll say on that. And that's the way it is done. But it would not have been -- and the other thing is part of what the Court can rely on and part of what I rely on is the process between the parties. If there were all these flaws, show me. Where are they? Mr. Cosenza said in his opening eight or ten times fundamentally flawed. Then how come the plan administrator which reviewed all the evidence, which held nothing back, only identified flaws seven percent of the time?

So, Mr. Grice agrees -- we say the PA agrees on Chart 39 that the Trustees' evidence is what the Trustees say it is. He said repeatedly he's not -- Mr. Grice did -- that he's not contesting that the evidence is what he says it is and that -- I asked him many times and on Slide 39 we

have all of his responses.

So, it's been an hour and a half. I find myself flagging just a tad.

THE COURT: Take a break?

MR. SHUSTER: Thank you.

THE COURT: All right. Ten minutes? Will that do it?

MR. SHUSTER: Yes, please.

THE COURT: You sure? Ten minutes?

MR. SHUSTER: Yes.

THE COURT: Okay. Very good.

[RECESS]

MR. SHUSTER: I'm wondering if I've left anything unsaid, but I'm going to keep talking anyways. But --

THE COURT: Well, we have a whole deck, Mr. Shuster.

MR. SHUSTER: We do have a whole deck. And this is our skinnied down deck. We actually -- because we thought -- so, the whole --

THE COURT: Now you're breaking my heart.

MR. SHUSTER: -- the whole -- the day-long deck we have which we will submit -- so, you'll -- the Court may notice that the page numbers in this --

THE COURT: Is that an agreement that you have with the plan administrator?

MR. SHUSTER: Yes.

THE COURT: Yes?

MAN 1: We have no objection, Your Honor, (indiscernible).

THE COURT: Okay.

MR. SHUSTER: So --

MAN 1: I do just want to note to the extent that there is briefing, that's additional (indiscernible) briefing versus the slide presentation. We haven't seen their full deck so, you know --

THE COURT: Well, I'm just going to assume that it doesn't cross that line.

MAN 1: Sure. With that, Your Honor, we're fine.

THE COURT: Okay.

MAN 1: Thank you.

THE COURT: All right.

MR. SHUSTER: So, I'm on Slide 40. I note that part of the reason I just mentioned there's a bigger deck is because the slides jump around and they're out of order in the deck light but --

THE COURT: Oh, I see. Okay.

MR. SHUSTER: Yes. But I'm on Slide 40 now.

THE COURT: Okay.

MR. SHUSTER: And so, this goes really to the preponderance point.

THE COURT: Okay. So, now you've lost me. So, where is Slide 40? It's not --

MR. SHUSTER: Okay. So, Slide 40 is after 39 but before 58, which is before 33. So, that's -- it's right after the Grice side that the PA agrees that the evidence -- the Trustees' evidence is what the Trustees say it is.

THE COURT: Road map --

MR. SHUSTER: Yeah, you're -- the Court is -- you're on your way.

THE COURT: Multiple pieces of evidence. Trustees provided -- I'm with you now.

MR. SHUSTER: Excellent. So, this really goes to the preponderance point and to some of the exemplars and narratives that were described -- that were discussed at trial where there were repeated observation that maybe some other fact or set of facts was true. But, you know, maybe it's not really good enough to rebut evidence. And the fact that someone can posit a plausible alternative scenario is not enough to -- it doesn't cut it on a preponderance standard. It might on a reasonable doubt standard.

So, Slide 33 is further to the same theme which is that we thought that Mr. Grice speculated in many instances about what was going on with these loans and saying that I don't know if something is true or if something else might be true does not constitute an evidentiary rebuttal. And

the Slide 33 goes to the same point. There was speculation about whether borrowers' circumstances have changed, the same on 42. It's the same type of evidence going to the same point.

So, then we come back to use of the word material in the representations and warranties themselves. And we make the point that income debt occupancy are material to the underwriting decision. It's -- by showing that, that we meet the standard. And indeed, as Mr. Aronoff testified, the selection of what data points in the loan application to verify was made with an eye to materiality and to what is material to the underwriting decision itself.

The misrepresentations of income, we -- I think I showed this in my opening and during Mr. Aronoff's testimony, but the misrepresentations are substantial. We're not talking about -- you know, on the 30,000 income breaches we're not talking about five to ten percent overstatements of income. We're talking about overstatements that are really dramatic, of a dramatic magnitude and among other things would enable the Court to draw the inference of intent because it's not credible that these were accidental or inadvertent overstatements of income.

This is a point on 46 that I've made -- you know, we've made before that goes to the fact that the evidentiary

sources that the Trustees rely upon are in wide use in the industry, accepted by the Courts, and were used by Lehman and Aurora themselves in the ordinary course of business, which is evidence of industry custom and practice with respect to use of those evidentiary sources. So, we then have essentially the same sequence of slides and arguments with respect to debt as we do with respect to income.

So, on Page 76, debt is material to the underwriting decision and that comes from our experts, it comes from the courts, and it comes from -- out of Lehman and Aurora's own mouth in contemporaneous documents and in these case -- in the case here it's a sworn affidavit by Mr. Trumpp talking about the materiality of income to meet --

AUTOMATED VOICE: You'll need to connect to the internet first.

MAN 2: That is not my phone.

MR. SHUSTER: It's on airplane mode so I'm not quite sure why it did that but I apologize. But it is on airplane mode. So, I don't know --

MAN 2: Siri had a question.

THE COURT: Siri has a question for you. It's your luck day, Mr. Shuster.

MR. SHUSTER: I've got my hands full.

THE COURT: It's not bad enough that I have questions for you.

MR. SHUSTER: So, the misrepresentations of debt were substantial. You know, predominately they're 30,000 or more, 50,000 or more. Most of them are in the 100,000 to 500,000 range. A good deal of them are in excess of $500,000. Those are really dramatic misrepresentations of debt. The -- on Slide 78, the -- we show again the same -- that -- for the evidentiary sources that we used to establish the debt breaches, those are use in the industry, used -- accepted by the courts and were used by Lehman and Aurora, which again is potent evidence of custom and practice in the industry with respect to use of those evidentiary sources.

THE COURT: Mr. Shuster, are you going to get to a slide -- and I think you've done this in the opening -- are you going to tie on Slide 45 with respect to income and on Slide 40 -- I'm sorry, 77 with respect to debt, is your calculator going to tie these bar amounts to actual amounts to actual dollars?

MR. SHUSTER: You know what? Let's jump to the calculator. I can jump to the calculator and then if --

THE COURT: Okay. If you're going to get to it, that's fine.

MR. SHUSTER: Well, I -- but you know what? I want to make sure that there's time enough for the calculator and then I can come back and go over some other

stuff. But since Your Honor raised the question -- so, what the calculator does, if I -- if we just flip ahead briefly at least to, say, Slide 238, just by way of -- as an example or --

THE COURT: The big four?

MR. SHUSTER: Right.

THE COURT: Okay.

MR. SHUSTER: So, Your Honor can see there if you -- there are the breach categories, the evidence source, status, and the percentage of overstatement for income and the dollar numbers for debt. So, clicking -- unclicking any of these -- unclicking a breach category will change the dollar number. And we run through this in sequence. Unclicking any of the evidentiary sources will change the dollar number. Some of them don't change it very much. But certainly the ones that are in the most common evidence -- above the line in the evidence column.

So, yes, if we flip forward, we then run through a number of scenarios. And do we have the calculator loaded on a -- you know, we can run it live. So, we can --

THE COURT: Because your brief -- I couldn't make sense of what you said in your brief. Let me see if I can find the page. There it is. So, do you have your post-trial brief handy?

MR. SHUSTER: I'm sure we do. But I -- do we have

our brief handy? Thank you. 47 or 46?

THE COURT: 46, yeah.

MR. SHUSTER: Yeah.

THE COURT: So, the text under the chart.

MR. SHUSTER: Yes.

THE COURT: It says, “If the Court decides to apply different limitations regarding evidence sources or variance thresholds, then the calculator will generate revised numbers for the running total column.”

MR. SHUSTER: That’s the product of our best legal minds. So --

THE COURT: So, then the next column -- I don’t know what next means -- is simple subtraction. For example, the $903 million figure for occupancy breaches is the difference between the running total for accepted debt occupancy loans.

MR. SHUSTER: So, here’s --

THE COURT: And I can’t follow that. I -- so --

MR. SHUSTER: This -- so -- and rightfully so because there’s a typo there. The 903 should be 896. It should reflect the actual number because I think we might have been fiddling with a different scenario. So --

THE COURT: Okay.

MR. SHUSTER: -- and we -- yeah.

THE COURT: So, yeah.

MR. SHUSTER: So, the Court is right.

THE COURT: Okay.

MR. SHUSTER: That doesn't work.

THE COURT: Okay. So --

MR. SHUSTER: It should be 896 million figure for occupancy is different. So, what I've done -- what we've done in the deck is we start out at Page 234 with all loans and with everything checked. And then with the -- all values for debt and occupancy. And then on the next page we have the two columns that are in our brief with those values. And then we start to uncheck, as much as it pained us to do so -- so, we unchecked BLS and then we showed income as a percent overstatement at least 30 percent income and at least 30,000 of undisclosed debt. And then -- so, that, you know, yields a net purchase price of 10.5 rather than 11.3, and that is then reflected in the table on 237. And then we got to some further scenarios which is we just had the big four breach categories checked, the borrower breaches, and all values in terms of income and debt. And that yields 9 million 170. And then we go to the big four again but we uncheck BLS and we've unchecked something else. And that's not much of a difference there at 8.8.

And then we have the big four. We uncheck BLS. This is on 244. We have 30 -- at least 30 percent for income overstatement, at least 30,000 for debt. That yields

a number of 8,005,000,000. And then we have a table that reflects that. And then we go from there. So, then we increase the magnitude thresholds for 50 percent for income and 50,000 for debt. And that takes us to $7.6 billion with a corresponding table on Page 243. And then we can provide the Court the calculator. It's loaded onto a device and there's nothing else on there but the calculator. It's the same information we provided to the plan administrator.

I also have with me, though we didn't put it in the deck, a slide that takes out the on-hold loans and shows what the magnitude of difference would be there if we did that. So, I'm happy --

THE COURT: Is there a slide for unchecking -- I must have missed it. The missing document breaches?

MR. SHUSTER: So, most of the scenarios that we provide, the missing documents are unchecked. There -- we're not including them in the numbers. So, if --

THE COURT: Well, I mean --

MR. SHUSTER: -- Your Honor looks at the breach category column to the furthest left under the blue bars --

THE COURT: Okay. So -- I see.

MR. SHUSTER: -- for most of the scenarios we present --

THE COURT: So, in the big four all of those are unchecked?

MR. SHUSTER: So, the big four are all checked and then all the others are --

THE COURT: And then all the others are unchecked.

MR. SHUSTER: -- yeah, are unchecked. And we provide that a number of times. Mostly -- we use as a consistent example taking out BLS, just plucked one from thin air, and then we use scenarios -- we give all the different scenarios from all values, 30 percent and 50 percent of income and 30K --

THE COURT: But nothing on this differentiates, for example, in the debt bucket --

MR. SHUSTER: Pre and post.

THE COURT: -- pre-closing or post-closing debt?

MR. SHUSTER: No.

THE COURT: And nothing in here deals with the argument that from Mr. Aronoff's testimony there was not an effort to identify actual income as that word is regularly, commonly used in English language.

MR. SHUSTER: So, by --

THE COURT: It was merely to find sufficient evidence to -- for Mr. Aronoff to conclude that the income that the borrower indicated was incorrect.

MR. SHUSTER: So, that's correct about the calculator.

THE COURT: Okay.

MR. SHUSTER: I think -- you know, I'm going to come to some of what I think --

THE COURT: Okay.

MR. SHUSTER: -- Mr. Aronoff said on the subject --

THE COURT: Okay.

MR. SHUSTER: -- of the reference.

THE COURT: So, that was really helpful to take me through the calculations.

MR. SHUSTER: Right. So, that's --

THE COURT: And you weren't here but I'm sure you were told by Mr. Goldberg and your team that Mr. Cosenza had a lot to say about why I shouldn't consider any of this. But he's doing a good job of not popping up and saying that now. So -- but I thank you for doing that. I understand this and the mechanics of how it works.

MR. SHUSTER: And, you know, we -- it -- we have the calculator to hand up to the Court with our deck.

THE COURT: Yeah. I mean, I don't frankly think it would be appropriate for me to drive around the calculator myself because the record has to be a static thing.

MR. SHUSTER: Okay. Well --

THE COURT: So, I'll accept these slides as a product of what the calculator does.

MR. SHUSTER: And of course, to the extent that the Court wants us to run any other scenario with the calculator, that can easily and very quickly be done.

THE COURT: Okay. Thank you.

MR. SHUSTER: So, I think we're back in debt, which is at Page 77. And then -- right. So, we were roughly here when the Court asked about the calculator. And then -- so, if one looks at this, at the debt chart, the Court could either under the calculator take all the borrower's -- take the 30K and up or the 50K and up.

Then we make the same points about evidentiary sources for debt, and I think I've already covered that frankly, and then again addressed the point that there is -- there was from the other side speculation in some cases -- in many cases -- about alternative scenarios and our view is that that's insufficient under the preponderance standard to rebut the evidence that preponderates. So, then we -- that's 89 and then Slide 90, and then we come to DTI.

And again, the DTI discrepancies were substantial as Chart 97 shows. Most of them are 75 percent or greater. That is to say, a DTI of 75 percent or greater, not a discrepancy of 75 percent or greater but a DTI of 75 percent or greater, and that the -- Mr. Aronoff here describes how DTI was calculated and -- on Slide 98 and he does repeated say that they used the number that they believed more

accurately reflected the borrower's income, that was more likely than not to be the borrower's income, and that the income that was believed to be more likely the case than not with appropriate citations. So, that was for DTI.

And then occupancy, again we address the materiality of occupancy to the underwriting decision relying on our expert, Mr. Aronoff, on in this case the Nomura decision of Judge Cote and on a sworn declaration submitted by Aurora. Our evidentiary sources for occupancy are commonly used in the industry, accepted by the courts, and were used by Lehman itself which is evidence of their wide use in the industry. The borrower's covenant that he or she -- here we say they because that's the new convention -- that he or she shall continue to occupy the property, shall occupy within 60 days and shall continue to occupy for at least one year.

So, intent doesn't enter into it. There are occupancy affidavits that further underscore the point. But regardless, the affidavits are not uniform across all of the occupancy breaches but the borrower covenant is. And it's the shall occupy within 60 days and shall remain in the property for a year language that we principally rely upon. And frankly, we put in the affidavits only to the extent there's any concern that we have to deal with intent or anything like that. But -- because the occupancy affidavits

also don't speak of intent.

So, Mr. Morrow -- and I -- and we've gone over this, Slide 118. Mr. Morrow confirmed the reliability of the Trustees' review process. He did conduct his own review. He did review loans by himself and with a team and has ultimately agreed with the Trustees' findings on 92.7 percent of the loans. That's on Slide 118. And that percentage was even higher on the borrower breaches where his disagree rate was more like in the 4 percent range.

And Mr. Morrow, as Slide 119 shows, has extensive experience -- true mortgage loan origination and underwriting experience. Slide 120 shows his agree rate overall, 92.7 percent, and his agree rates pulled out for the big four breach categories, the borrowing breaches.

THE COURT: Wasn't -- maybe this is as good a time as any to talk about this point but a lot of what -- my recollection of what he talked about was the put-back process, right, where there's a -- where the -- earlier in time, right, where there's actually going to be a put-back, right? Do you think there's any difference between a living, breathing put-back process and what we're doing here? There's not going to be a put-back. We're setting a damage number.

MR. SHUSTER: No, I don't think --

THE COURT: You don't think so?

MR. SHUSTER: No. I don't think -- I don't think as a practical matter there can or should be any difference. Same process, same legal standards, same contractual language. I don't think so.

THE COURT: Okay.

MR. SHUSTER: So, the Slide 122, we say that the PA -- the plan administrator had every opportunity to rebut the Trustees' claims, which of course it did in the protocol process and it did again in response to the Aronoff reports, Aronoff's Exhibit 15. And Exhibits 4 through 13 were provided with his affirmative report on June 1 and no more specific responses or rebuttals to the breach descriptions were provided in response to his report. He also in his rebuttal report which was provided on July 25th added a column for particularized response, yes or no, by which he meant a response that -- as he testified that specifically addressed the evidence rather than stated the plan administrator's positions on a more generic basis. The -- his counts -- his findings here were unchallenged. I mean, he offered this as an expert opinion and his conclusions as to the percent of the time that the plan administrator provided a specific response were not challenged by the plan administrator or any of its witnesses.

The Trustees' evidence is admissible under -- by agreement of the parties under Exhibit G, and then as

summarized in the Aronoff exhibits and it's our respectful view that those summaries are admissible under FRE-1006 and under applicable caselaw, and they were provided on June 1, and they weren't challenged by any expert of the plan administrator.

THE COURT: And now you're talking about the Aronoff exhibits?

MR. SHUSTER: Yes. Exhibit 15, Exhibits 4 through --

THE COURT: When Mr. Aronoff testified that he didn't prepare them.

MR. SHUSTER: He testified they were prepared at his request and direction and under his supervision, and with the participation of his immediate subordinates.

THE COURT: And they were -- he agreed that they were prepared from -- not the claims tracking spreadsheet --

MR. SHUSTER: He --

THE COURT: -- but the 1.46.38 connect database.

MR. SHUSTER: He testified that they were -- all of them were based on the evidence that was exchanged in the protocol and some of that may have been taken from the Duff and Phelps -- a Duff and Phelps database, but it was the same and only the same evidence that was provided to the plan administrator during the protocol process and that has been submitted to the Court under Exhibit G. That's all

that's in his exhibits, what the other side has and got. There's nothing else.

I do note, as we noted in our brief, and I understand there was some discussion of this yesterday, but the fact is that Mr. Trumpp took Mr. Aronoff's Exhibit 15 and created evidence that the plan administrator presented to the Court, which is his chart of how many loans relied on a single piece of evidence, how many breaches relied on a single piece of evidence.

THE COURT: All he did was summarize what could be derived from Aronoff's --

MR. SHUSTER: Right.

THE COURT: -- exhibits.

MR. SHUSTER: But he presented that as accurate evidence to the Court.

THE COURT: No, he did not. I beg to differ with you. He presented that as an accurate summary of what appeared in Aronoff's exhibits. He did not independently bless what appeared in Aronoff's exhibits, in the sense of that -- acknowledging or agreeing that what was in Aronoff's exhibits was an accurate summary of the universe of documents.

MR. SHUSTER: Well, we may be talking past each other.

THE COURT: Yeah.

MR. SHUSTER: What he did is he went -- he sorted the Aronoff Exhibit 15.

THE COURT: That's what he did.

MR. SHUSTER: And --

THE COURT: He sorted.

MR. SHUSTER: But he said, "This shows me and I'm telling the Court that here's how many breaches in these different categories rely on one piece of evidence."

THE COURT: He's say how many breaches Aronoff says --

MR. SHUSTER: Yes.

THE COURT: -- rely.

MR. SHUSTER: Yes.

THE COURT: Right.

MR. SHUSTER: But he presented that as accurate evidence to the Court, which --

THE COURT: He presented it as an accurate summary of what Aronoff said, not as an accurate summary of what the underlying documents said. If Aronoff got it wrong and there were, instead of 1,000 document -- 1,000 loans or claim -- 1,000 loans that relied on BLS only and in fact there were 2,000, nothing that was said adopts or says that Aronoff got that right. He simply summarized, as you said, what Aronoff said.

MR. SHUSTER: Well, I do not remember Mr. Trumpp

reserving and saying, you know, I -- this may not be accurate, I'm just taking what Mr. Aronoff said. He said, "I prepared a table that shows how many loans are supported by one piece of evidence or by two -- breaches are supported by one piece of evidence or by two or more. These are the numbers. This is evidence. We're presenting it to the Court. The Court can rely on this evidence."

That's what he did, and the evidence was presented to the Court. They didn't say to the Court, don't rely on this evidence; it may not be accurate. Or we have all these reservations or qualifications. They asked the Court to -- presented it so that the Court could see how many pieces of evidence --

THE COURT: You see, this is similar to the delightful discussion that we had about the $772 million where there's a dispute as to whether or not the plan administrator is, you know, adopting a number as opposed to merely taking a number that's been presented and making observations about it.

So, I think we should move on from this point. I'll have to go back into the record and decide whether I believe that Mr. Trumpp adopted and made his own those numbers or whether he simply was presenting a sort -- a sorting of Mr. Aronoff's numbers.

MR. SHUSTER: Thank you.

THE COURT: All right?

MR. SHUSTER: Yes.

THE COURT: Okay.

MR. SHUSTER: So, I'm at 150, the AMA requirement. We quote, initially, the language and I stated the Trustees' position with respect to the language and the language that we think is being red into the language by the other side earlier, and then we had testimony from Mr. Trumpp which is quoted on Page 155 which we think is quite strong in showing that a loan with a misrepresentation has a lower value. This is separate and apart from the many sworn declarations that Lehman and Aurora submitted including declarations sworn to by Mr. Trumpp and including declarations submitted by my good friend, Mr. Rollin, where the -- Lehman and Aurora said the same thing.

THE COURT: So, what they're -- what someone's going to tell me is that he said this about whole loans, not securitized loans.

MR. SHUSTER: I --

THE COURT: And you're going to tell me it doesn't matter.

MR. SHUSTER: I don't see how it does or can. I really don't. And all I can say is -- and it hasn't -- and I respectfully submit it hasn't been explained in any way where it should make a difference. They said -- they said

in sworn declarations, once a loan has a known misrepresentation, it can't be sold into a securitization except at a discount.

So, these are loans with unknown representations that were sold into the securitization without a discount. Clearly, those loans, had the misrepresentations been known, would've had to be sold in -- at a discount. And it doesn't matter if it's a whole loan. And it doesn't matter that it becomes a securitized loan. It surely can't be the case that you can say to the person who sold the loan to you, you have to take it back because I can't sell it into a securitization except at a discount.

And then when it's in the securitization, say that loan doesn't have a diminished value. I mean, you cannot make that argument. There's no way, I think, to get around that.

THE COURT: Okay.

MR. SHUSTER: So, Lehman itself sold defective loans at a discount as Mr. Trumpp testified, and he -- on Chart 157, Mr. Trumpp agrees with the Trustees that a riskier loan has a lower price or a higher interest rate. That's why, as I said earlier, it's not the same loan. It would never be the same loan if the misrepresentation were known.

That's why the seasoning point actually doesn't go

to the heart of it, because the loan should either have been sold at a lower price or there should've been a higher yield. It's a dead instrument. It's riskier. You either pay less or get more. And those effects are continuing, as Judge Castel found in MARM and we quote that at Page 158.

Mr. Trumpp also testified there's no way to cure a misrepresentation of debt or income. The effect of the harm is continuing. Once you've paid a higher price, you've paid a higher price. Once you're getting less than you should be getting, that doesn't change. They make a big point about how you can't sell the loan out of the securitization. That's the whole point. You're stuck with it. You can't sell it out to the person who sold it to the trust via the put-back remedy.

So, on loss causation. You know, it's not in the governing agreements. It's not part of industry customer practice. It's not consistent with Lehman's own sworn statements or relevant caselaw. And all of the cases adopt the interpretation of AMA, essentially that Judge Castel elucidated and that other courts have -- the monoline cases themselves, as we say on Page 163, rely on put-back precedents.

You know, the Syncora case cites the LaSalle case, for example, which is a put-back case for purposes of establishing the standard. The parties know how to put a

loss -- proximate loss or proximate cause or loss causation standard in the documents when they want one. They had one, for example, in LXS 2,615 in the Trust Document. That's excerpted on Slide 164.

And Mr. (indiscernible) himself admitted that that language could've been in other deals, was in other deals, and wasn't in these deals. And then I have -- we have the language from the various affidavits which I've already quoted and referred to, but tough to get around. And that's on Slide 170 with respect to income and on 171 with respect to debts and on 172 with respect to occupancy and on 173. So, you know, I'm not --

THE COURT: But let me --

MR. SHUSTER: Yes.

THE COURT: But let me understand this, though. Because then what I don't understand is -- I'm with you slide after slide here, okay. What I don't understand is the concept of deemed AMA. Because some of the things that fall into deemed AMA just kind of on a, you know, holistic basis, are a lot less worse than the big four. So, I just, like, intellectually and logically, why is there a category of deemed AMA?

From what you are telling me, even though I stay here all day and you won't admit it, is that essentially this -- you are telling me when there's a material breach

there is an adverse material effect. You are asking me to read that language in a different way, and I -- I'm struggling with that, so --

MR. SHUSTER: Well, I'm not --

THE COURT: So, splain, as Ricky used to say to Lucy.

MR. SHUSTER: Yes. We're not -- we're certainly --

THE COURT: You're lawyers -- you put -- you just said it, right? Lawyers know how to draft documents. So, why is there a bucket of deemed AMA and not just --

MR. SHUSTER: So, the deemed AMA are breach specific. The AMA -- so, they carve out, out of the broader AMA --

THE COURT: Yeah.

MR. SHUSTER: -- requirement. They're breach specific for a handful of breaches where there's a legal requirement, essentially. That's what's deemed AMA. Until a HUD-1 or something like an appraisal where you, you know, something fundamental like that is missing. But then AMA applies across the board to a whole range of other --

THE COURT: But is it --

MR. SHUSTER: Right.

THE COURT: But it could be deemed across the board.

MR. SHUSTER: It could be. But there would be breaches. There could be other breaches. For breach, there are, for example, in a lot of these loans they're state-specific breaches. You know, Ohio -- the Ohio, you know, Lender Liability Act or whatever where it may not be. You have to say that you're complying with it, but it may not be -- but it's not been deemed --

THE COURT: (Indiscernible).

MR. SHUSTER: But it's not deemed --

THE COURT: Right. You could say other than with respect to requirements --

MR. SHUSTER: You could.

THE COURT: -- under applicable state law --

MR. SHUSTER: You could.

THE COURT: -- every material breach of income, debt, or DTI is --

MR. SHUSTER: Yes.

THE COURT: -- deemed AMA.

MR. SHUSTER: Look, the --

THE COURT: You know.

MR. SHUSTER: Yes. This -- you know, I don't think somebody really, really smart sat there at the beginning and said, this is how we're going to do it. These -- you know, these documents evolve and forms develop and then the get adopted and they get modified, but, you know,

on the subject of the borrower breaches, again, as a practical matter the evidence goes to the same points. Income evidence is material to the underwriting decision, and if it's misrepresented one way or another, that's a material breech of the rep.

But a misrepresentation of income also goes to whether there's an adverse material effect, and I'm not -- we're not saying that the Court should either conceptually or linguistically say these are deemed, but it is -- you know, but we do have out of, effectively, the defendant's own words, that it is a market fact -- it's a fact -- that if there's a misrepresentation of income, debt --

THE COURT: But let -- so let me give you one -- let me give you a hypothetical which you've heard from me before.

So, we have a loan and we agree that there was a breach -- and income breach. A modest one. Not a huge one, a modest one. And, you know, Josephine Borrower makes it through the crisis and she's paying and she's working three jobs and we love, her, right? She's -- and here we are 10 years out and someone wants to sell that paper. Someone wants to sell that loan. There's that breach. There it was, at the time, right, and now what we have is perfect performance on that loan.

And, not only that, but Josephine came into some

money and now, you know, her sister lives with her. Her sister works and contributes to the household and everything's great. Irrelevant? When somebody's going to buy that paper, right, they're only going to look at what happened 10 years ago and say, "Oh, look. There was a misrepresentation of income 10 years ago. I'm going to ignore the performance of this loan and I'm not going to pay full par value -- what's remaining of par." Because if you layer that kind of analysis onto other assets and other commercial transactions, that's just not the way a market acts, and so I'm struggling --

MR. SHUSTER: Right.

THE COURT: -- with that.

MR. SHUSTER: So, all I can say is, one, it is a fact, the trust isn't going to go and sell the loan.

THE COURT: Understood.

MR. SHUSTER: Its paid too much for the loan or it's gotten too low a yield on the loan. Those are facts. That's what Lehman itself says. I -- you know, I have an asset. The asset may be performing, you know, but I paid too much. I paid for a Caddy, I got a Chevy. You know, I'm not --

THE COURT: And how are the certificate holders who have gotten that cash flow for 10 years -- how are they harmed?

MR. SHUSTER: The certificate holders are harmed because they should either have paid less -- it affects their ultimate yield on their paper. They should've paid less for the loan or they should have gotten a higher interest rate on the loan. That's the point, essentially. I mean, that's why they're harmed. They -- you know, they're getting paid out on a loan that would've had, you know, different terms.

It was riskier, and you would've had to -- Lehman itself says, you would've had to sell it at a discount or -- Mr. Trumpp says or give a higher interest rate. One or the other has to be true. That's what makes -- that's what accounts for it.

So, we have that. On 173, Mr. Trumpp acknowledged that Aurora and Lehman asserted put-back rights with respect to both liquidated and active loans. There's no requirement that AMA be quantified, that -- you know, the Courts have been very clear on that. And so then jumping ahead to 183, where essentially, you know, we're saying that the PA should be estopped from, you know, disavowing its own statements for purposes of obtaining judicial relief. I just wanted to come briefly to the subject of the settled trusts now, so I'm moving onto estimation methods. Said what I had to say for the moment about breach and AMA.

This is the SARM Trust, and the point here in the

language that we highlight is that the master servicer --

THE COURT: Just as a technical matter, estoppel only applies where it's the same party, right?

MR. SHUSTER: Same party and it's been successful in obtaining judicial relief. Yeah. Yes.

THE COURT: Okay.

MR. SHUSTER: The SARM loan just shows -- the Trustees didn't exercise discretion, didn't have the right to exercise discretion with respect to the appraisals, and they were not a fair market value. They were not an independent analysis. There was not an independent appraisal. No evidence was provided of how the appraisals were done, but it is obvious that they simply took the plan administrator's recommended settlement percentage and that's what they --

THE COURT: Trustees get to consent to the appraiser, though.

MR. SHUSTER: To the appraiser.

THE COURT: To the appraiser.

MR. SHUSTER: Yes.

THE COURT: Right. Okay.

MR. SHUSTER: Or object. They get to object --

THE COURT: Yeah.

MR. SHUSTER: -- to the appraiser. So, here's our point about the institutional investors, I think, that I

made earlier which we submit that their views are not particularly informative in light of what -- particularly in light of what they didn't know and what has transpired since. We say that the -- on Slide 226 -- that the plan administrator's comparable settlements are not comparable because of the differences that we identify here. There were significant statute of limitations issues. They were prelitigation in three out of the four cases. And those are the best comparables they have, but they're not particularly comparable.

So, then we flesh out the point that they were subject to statute of limitations defenses. That is -- there's the evidentiary support in the record for that argument. That was Mr. Fischel -- Professor Fischel testifying and these were his concessions under cross examination.

THE COURT: But what he is saying was that they were asserted statute of limitations defenses.

MR. SHUSTER: Yes. He's -- there were potential bona fide statute of limitations defenses.

THE COURT: Potential bona fide. There were potential statute of limitations defenses, and a statute of limitations defense is a defense like any other. It's just feels like it's more of a defense. It's a defense.

MR. SHUSTER: I think that -- well, look, I'm not

-- I can't testify.

THE COURT: No.

MR. SHUSTER: This is what we have in the record. He acknowledged that there were such defenses. And he himself, as I said --

THE COURT: Potential defenses.

MR. SHUSTER: Yes. Yes. Yes. He acknowledged that there were such potential defenses, but, you know, one assumes that defendants and their lawyer aren't asserting --

THE COURT: But what was --

MR. SHUSTER: -- aren't asserting defenses in back faith and that they have a good faith basis to assert them.

THE COURT: Sure.

MR. SHUSTER: And I'm not saying they're winners necessarily.

THE COURT: What was the recovery percent -- what was the recovery ratio for JPM -- for the JPM settlement, do you remember?

MR. SHUSTER: Low. I know that. Unpardonably low. No -- I kid, but it was --

THE COURT: Yeah, so JPM was 7 percent, okay. So, if I take your argument, right, 50 percent, okay. So, then I say, okay, so doesn't get me to 55 percent.

MR. SHUSTER: No, not on the pure math. But it suggests that they're not comparable settlements. I mean,

apart from the fact that it's a black box. What were those claims? What were the dynamics? What were the dynamics of the settlement? What were the concerns about those claims?

Those loans hadn't been reviewed at all except a limited review in the WaMu case, none in the other cases. So, you know, yes on the math there, yes. But there's a lot more to why they're not comparable. But they had statute of limitations defenses. They -- the fact that there were no loan reviews and that these were prelitigation settlements, that has to count for a lot. Once, you know, we're at a dramatically different point. The parties here agree and this is important and this is why I was very happy with this from the start. But the parties agree.

Mr. Cosenza said in his opening that the question is what would've happened to these claims had they gone through stages three, four, and five of the protocol, five being a trial? And the Court asked, did both sides agree on that. I said, "I'm very happy with that," in the opening. Mr. Trumpp testified to that.

So, we're talking about what these claims would be worth if they were tried, and so considerable evidence has been presented here on that subject. Really, what do prelitigation global settlements elsewhere say about that? They don't say anything about these securitizations, these loans, the evidence that we have here.

That's our argument. And, you know, in that sense, it's an estimation like any other where ultimately you're trying to -- the Court is trying to decide what are these claims worth if they're tried.

So, the -- we show that the opt-outs and Professor Fischel testified to this, that the -- I think he testified. He may have testified he didn't know; I don't remember. But we showed, in any event, as an evidentiary matter that parties who opted out of those global settlements did consider -- you know, got a substantial premium above those settlement levels. And then we go on to say that the litigated case settlements, you know, would support a valuation of at least $5 billion. That's on Slide 229.

THE COURT: These were the Finkel ones?

MR. SHUSTER: These were the Finkel ones. Now, admittedly, these cases were litigated by expert counsel, but --

THE COURT: Were itty, bitty cases --

MR. SHUSTER: Well --

THE COURT: -- litigated by some fly-by-night law firm.

MR. SHUSTER: You know, these are -- it's still a lot of loans and a lot of money, and you're talking in the Ace cases, those are all Deutsche Bank, you know, settlements and you know, the cases were litigated. Those

were the amounts. Here that --

THE COURT: But Mr. Shuster --

MR. SHUSTER: But that's -- right.

THE COURT: Okay, 23 and 55, there's just a huge difference.

MR. SHUSTER: Well, that -- there is. That's a settlement number. You know, 23, 24, that's a settlement number with everything that's built into settlement. These were pretrial, you know. This -- they didn't go through the same process that we went through here, but if -- the point is -- our point is, if the Court is going to look at settlements, it ought to look at settlements in cases where -- that are nearer to this case in that there were loans -- loan reviews of thousands and thousands of loans in these cases, and the settlement yielded a much higher value relative to realized losses in the pools.

So, we're not advocating estimating the claims by looking at other settlements, but we're saying if the Court is to do that, it should take into account, respectfully, settlements that have -- were made when the parties were much further along in the process and had completed the same steps that are -- that have been completed here. And the MARMS -- the proposed MARMs settlement at Slide 230 is at roughly the same level.

MR. COSENZA: Your Honor?

THE COURT: Yes, Mr. Cosenza?

MR. COSENZA: I can do it after, but this was not allowed into evidence during trial.

THE COURT: I don't even know what this is.

MR. COSENZA: This MARM. Sorry, there was a discussion. There was something never been produced before. This was during the discussion with Mr. Finkel. This was not included into evidence. (Indiscernible) behind the pay wall, they said everyone had this. This is generally available. You had to be an investor.

THE COURT: Oh, that's right. You're right.

MR. COSENZA: So, I don't know how this is here.

THE COURT: Yeah, you're right.

MR. COSENZA: I apologize for that.

THE COURT: No, you're right. You're right. Yep. It wasn't generally available.

MR. SHUSTER: So, I think our view is that this should come in under Exhibit G like any other settlement, and it was on our exhibit list. That's --

MR. COSENZA: Your Honor --

THE COURT: No.

MR. SHUSTER: Okay. Understood. Okay. So, coming back to the estimation process on Page 232, I'm more than certain that we're not saying on Page 232 the Court doesn't know better than we do.

And then on Page 233 we're talking about what I already outlined which is, you know, our suggestion of how the Court should estimate the claims by making rulings on breach types, evidence types, magnitudes, and then to the extent the Court wishes to apply an error rate or a discount, we think that would best be done using Morrow and Morrow's disagree rate and the plan administrator's own specific rebuttal rate.

And that is -- that's what we have. Then we have the calculator charts and that's what we've got. The Morrow disagree rate and PAs rebuttal rate are on Slide 256. So, again, thank you, Your Honor.

THE COURT: So, Mr. Shuster, this deck is very helpful to me. I'm questioning whether or not a larger deck would really help me. How strongly do you feel about that?

MR. SHUSTER: There's how strongly I feel and there's how strongly they feel.

THE COURT: You're the boss.

MR. SHUSTER: Man, I wish that were true. Often doesn't feel that way. Can we confer?

THE COURT: Sure.

MR. SHUSTER: And maybe, you know, we'll -- right --

THE COURT: Okay.

MR. SHUSTER: -- after rebuttal, I'll --

THE COURT: Well, yeah. Okay. Why don't we do that, and -- why don't we do that.

MR. SHUSTER: Thank you so much, Your Honor.

THE COURT: Okay, so --

MR. SHUSTER: Thank you for your attention.

THE COURT: I'll come back at about 12:15. Mr. Cosenza?

MR. COSENZA: I'll try to be as quick as possible, Your Honor.

THE COURT: Okay. But no more than half an hour, and then do you think you're going to want to -- you don't know.

MR. SHUSTER: No, but I certainly understand --

THE COURT: Okay. All right.

MR. SHUSTER: -- the dynamics.

THE COURT: Okay.

MR. SHUSTER: Thank you, Your Honor.

THE COURT: We'll see you at 12:15.

(Recess)

THE COURT: I'm in the midst of planning for the Federal Judicial Center's annual education program, and one of the topics that we're presenting is a 10-year review of the financial crisis. What happened, could it happen again.

MR. SHUSTER: You're now the expert.

THE COURT: So, I think they found it kind of

funny that I had to jump off the call to come back and do this. Yeah.

MR. COSENZA: You definitely after this case, you know, should be the expert on that panel -- moderating it.

THE COURT: As the teenagers would say, whatever. I remind you before everyone scatters when we conclude today, folks still owe me evidence, right?

MR. ROLLIN: Right. We're going to hand them up.

THE COURT: You are?

MR. ROLLIN: As soon as we're done.

THE COURT: Excellent.

MR. ROLLIN: Yeah.

THE COURT: And from your part as well, all together.

MR. GOLDBERG: I believe Mr. Rollin is handing them all up.

THE COURT: All up. Okay, great. Okay.

MR. COSENZA: Teamwork. Finally, at the end. Finally. Your Honor, I just have a few brief points to make.

THE COURT: Please.

MR. COSENZA: I'll try to be as quick as possible. First, Your Honor, Mr. Shuster said that there was -- or he sort of hedged that there was no agreement not to sample by the parties. There was an agreement between the parties.

He's hedged on this point several times during the proceedings.

Just want to make very clear, there's a letter on this point that was sent where we questioned what Mr. Morrow and Mr. Schwert were doing. He sent it in exchange to us, and we're going to highlight the relevant portion, hopefully (indiscernible) doing this on the fly, that there's -- a section here -- was not using the sample and Morrow analysis extrapolate. We can get to (indiscernible) things towards the end. We are going this on the fly so it may take a little bit longer. If we can just...

And you see here, this really (indiscernible) I want to point to. "Nor to the (indiscernible) expert reports of Morrow and Schwert tend to provide an estimation to a sampling." Your Honor, the understanding by the parties here was, this is not ever -- there was no one who was using sampling to prove up their claims here, and this is confirmed in various discussions that we had with the Court and with the parties. And so, the point here is Morrow and Schwert were not engaging in estimation through sampling.

Second, Mr. Shuster made a number of statements about Mr. Trumpp's testimony that I'd like to just address. He cites Mr. Trumpp's testimony which he characterized as indicating that the plan administrator did not hold any

evidence back in the protocol, and based on that he comes to his 93/7 percent ratio.

What he neglects to tell the Court is that the plan administrator sent, throughout the protocol, a number of responsive documents listing tens of thousands of documents showing information where we disagreed with their characterization. So even though it wasn't a particularized narrative rebuttal, there were cites to various documents in the loan file that were exchanged during the protocol showing why we disagreed with the Trustees' assertion. Mr. Trumpp testified to that.

So, then the extent this 93/7 percent thing has any accuracy, that's not true and it's not -- you know, Mr. Trumpp testified this extensively both at deposition and at trial, so we find that to be highly misleading.

Next, Mr. Shuster said that the Court saw only one missing document claim where the plan administrator found that the document was missing. As Mr. Trumpp testifies and as we've shown throughout the proceedings here, the plan administrator found missing documents thousands of times, missing document claims that were sent over. There were thousands of instances where we found the missing documents in the file, so it's not just, you know, this one example that Mr. Shuster references. And it also just shows the whole problem with using the exemplar approach.

You know, so you show one file where there was a missing document found by the plan administrator and he says, oh, we only showed one, but there were thousands during the protocol process where that occurred -- where we found the missing document that was in the file. That ties directly to the lack of QC1 and QC2 by Duff and Phelps in looking for any missing document files. Instead, they just sent those over to the plan administrator.

On the withdrawn loans, Your Honor, if there is a good explanation as to why that was done, why didn't Mr. Aronoff give that explanation at trial? He designed and oversaw the process, yet he was shielded from the decisions on the withdrawal of loans at trial. You would expect a primary expert to speak on the withdrawal of tens of thousands of claims.

And Mr. Shuster also mischaracterizes Mr. Grice's slide. There were thousands -- few thousand claims from the big four categories that were withdrawn as part of this mass abandonment of claims, so it infected the entirety of the claims that went through protocol. I wasn't as -- you know, this misleading impression, it was just simply the missing document claims. And we don't have any explanation from this, Your Honor, as you know, because this decision was cloaked in privilege and we never got any discovery on this point.

Mr. Shuster also criticizes Mr. Trumpp and Mr. Grice for what he calls speculation, and that's not enough to rebut the Trustees' claims, but Your Honor, we find this very, very ironic. Mr. Rollin touched on this, and we have a slide. Mr. Aronoff throughout his examination speculated many, many times and I would just put up a few here, and obviously this is all being done very quickly. And we cite to the various aspects of the hearing transcript.

He speculated that a self-employed borrower improperly forecasting his income, having suffered a temporary downturn in income due to fluctuating business. He speculated that a real estate broker in California misstated his income in 2004 because he's only on the job for three years. So, there's a red flag as to how someone inexperienced could make that much money. And he also speculated that a nurse's income was out of line with what he would expect a nurse to make.

These are the -- the Trustees had the burden. This is from his testimony on trial from the exemplars about their conclusions about there are breaches, and these are mostly tied to their biggest of their big four, breach of -- misrep of income claims -- and this is rampant speculation in order to try to meet your burden.

THE COURT: Mr. Cosenza --

MR. COSENZA: This is based on what they say is

unrebutted evidence.

THE COURT: Let me push back on you just a bit, okay? And I go back -- I'm not going to be able to find them, but bar charts of the big four where the Trustees bucket the percentage of income misrepresentation or debt misrepresentation, and there's some very big numbers.

How can I ignore that? I mean, without kind of buying into where Mr. Shuster started which was a kind of a table setting of, look, everybody knows what happened in the financial crisis and what happened in these mortgage securitizations. It was really bad and the closer you got to 2007, the worse it was. Without buying into that general proposition as an evidentiary matter, when I'm looking at what is being presented to me as 17,000 loans where there's a 100 percent misrepresentation of income, how do I not view that as something that --

MR. COSENZA: Sure.

THE COURT: -- that I -- basically, you're telling me I should ignore that.

MR. COSENZA: So, Your Honor, I guess there are two answers to that. One I think is -- goes on a very micro level and one goes on a much more macro level.

On the micro level, what the exercise here from the Trustees -- we've demonstrated there are all sorts of issues with the process, but the fundamental predicate for

all those calculations is actually having a baseline, actual income number that you can then sort of go through and do -- and calculate all the various variances that they use to show 100 percent.

And Mr. Aronoff testified very clearly there was never -- there's all sorts of testimony that was confusing on this point. Aronoff cleared it up and said the exercise was never to determine the actual borrower income. It was to determine whether more likely than not the borrower's income was, based on the representation in the loan file, was inaccurate.

So that is the determination he made in terms of -- the exercise that was done in terms of determining whether or not there was a breach. To then take that number, that number that they tried to pinpoint, and they try to extrapolate it out to say, "Oh, now we have a 50 percent variation based on what the initial exercise was."

From our perspective, that doesn't work and, you know, that's -- you know, I think that's just a fundamental problem with their evidence and their approach. It may be enough to show that more likely than not there was a breach for a number of these, but it doesn't show -- these magnitude slides are wholly -- they're totally misleading given the exercise.

And the second point I'll just take it to a very,

very high level, Your Honor. We're at $300 million in the protocol, right, the $278 to $300 million range. We understand. We are trying to be fair here to get to the right number. If we thought, you know, there weren't any other breaches -- be frank, if there weren't any other breaches in these files, we would say that's our number and we are done.

We are trying to get to the right number, and that 2.38 number that we're trying to be fair at, encapsulates and captures the fact there are loans here where there are various breaches of misreps of income or debt, and that is what we're -- you can look at those slides, take them for what they're worth. I don't think the calculations are accurate. I think they're wholly misleading in terms of the percentage -- stipulated percentage deviations, but these files -- there are files that have breaches in them, and that's -- we're trying to be fair by offering the $2.38 billion number.

So, moving on, Your Honor, to beyond Mr. Aronoff's speculation. And I do think, by the way, the burden is important in this context because to put up speculation and then say, "We've proven our claim and now we win," I mean this is -- the protocol is intended to go through additional steps. There's going to be a meeting confer -- there're going to be various discussions to confirm the evidence and

then this trial. So, this type of speculation would not have carried weight and the Trustees would have had to do a lot more than they did. They just don't automatically move to say, "We're at Step 5, and we win at trial."

Your Honor, on AMA, their (indiscernible) statement to AMA existed for particular loans. Remember the charts we saw from Mr. Aronoff didn't include any of the language from the actual contractual provision. It speaks entirely of risk of loss. Now, if we can put these back up, these are the stock responses. This is how they viewed AMA in order to say they've met the AMA provision. There's nothing in there that captures the actual language, the adverse materially affects the value of the loan. Instead, it's all based on risk of loss and, you know, potential likelihood and potential loss severity.

They did no individualized AMA analysis, and I would submit, Your Honor, if you look at all the cases, this is not sufficient to meet your burden in AMA context and it does not comport with the language of the contract. They impose and just say risk of loss is basically what the language means, and that's how they applied it.

Your Honor, Mr. Shuster also talks about the damages and what they've done here in terms of -- again, this is all they put forward to get the full purchase price. But he also mentions the pricing issue, that there're things

that have been priced differently --

THE COURT: Yes.

MR. COSENZA: -- at the beginning of the thing, but the Trustees here are not seeking damages that have any connection to any increase in pricing, interest rates, or loan terms. They're seeking the full purchase -- repurchase remedy and the full purchase price. There was no analysis done as it should've been done (indiscernible) the case, particularly for these loans that have performed for a long period of time, what their actual out of pocket damages were.

And I think you obviously brought forward a number of hypotheticals that we would agree with, that those are claims that should not have been brought and to the extent there even is a claim, it would be the difference between what, you know, what should've been done on day one in terms of pricing the loan versus what the trust -- what the certificate holder, you know, paid for that particular loan.

And Your Honor, I just also want to cite very quickly the MARM --

THE COURT: So what -- so, hold on a second. So, what you're saying is that Mr. Shuster and I had this exchange about damages and he didn't agree with my hypothetical about the perfectly performing 10 year loan. And the response was that, that all doesn't matter because

at the time of origination the pricing of the loan would've been different had everyone known what the borrower's true income was.

So, what you just said was that therefore if that's their theory, then the damage measure ought to be that difference. In other words, the loan would've been priced differently. It would've been -- the borrower would've been charged an eighth of a point more interest and that therefore that would've affected the loan price.

MR. COSENZA: That's absolutely correct, Your Honor. Again, we don't agree with their theory, but if that -- taking their theory to a logical extent, there's no proof on this. They just decided not to do that and they decided to go for the full purchase price, and that has consequences. There's just no evidence of that. If you look at what -- I'm going to go quickly. I didn't mean to do this, but I think in light of your question, I'm going to cover this. Judge Castel's decision in the MARM 3 case, he talks about this particular issue. I don't know if we have this slide, if we can pull it up. We can pull it up. And, Your Honor, this issue --

THE COURT: Before you move on, not to overly obsess with this hypo, but in my hypo, if that loan supports a piece of the damage claim, there's a netting for the current value of the loan, right?

MR. COSENZA: Correct.

THE COURT: So, then how -- which way does that cut?

MR. COSENZA: Well, I think in your -- in the hypothetical, if you have the -- a higher -- there should've been theoretically higher interest rate and this loan is still performing, I think it would be relatively straight -- nothing's straightforward -- but to get some sort of calculation as to what -- you look at the original underwriting guidelines --

THE COURT: The loan is not under the hypothetical, right, that would've been charged had everyone known about the misrepresentation. But right now you've got income breach, you've got a performing loan, right --

MR. COSENZA: Yeah.

THE COURT: -- so you've got what's remained of outstanding principal balance, right, and paid on accrued interest which should be nothing --

MR. COSENZA: Yeah.

THE COURT: -- because it's performing. So, the value of that loan -- there's going to be no damage component.

MR. COSENZA: Yes. I would agree with that, Your Honor. So --

THE COURT: Okay. All right. I'll have to think

about it a little more. I don't know where that -- I don't know how that helps, but you can keep going.

MR. COSENZA: Okay. Your Honor, just in the MARM case, this issue was raised and Judge Castel -- and this is not something the Trustees cited to -- but this is about the pricing issue on AMA. They said no witness for the trust offered credible evidence as to how a defect would've caused a higher rate of interest to be charged or other loan terms to be different.

The closest person who came to this was Ira Holt using a hypothetical example. He testified that there could be a higher rate or additional fees collected by the originator. If you go to the end, the Trustees -- the trust have not pointed to any specific content of any originator's rate sheet or guidelines that show that any loan among the thousands at issue would've issued at a higher interest rate or fee.

And that's, you know, going to the core point I was trying to answer, I guess inartfully, before, is you'd have to do an exercise of going back, would this loan have been issued on the original guidelines. What would've happened? What program would've been (indiscernible). Would it have been a different interest rate? There's -- I mean, as in this case, there's no evidence ever put forward by the Trustees on this point.

So, Your Honor, just going through my notes very quickly, I believe I covered what I intended to cover.

THE COURT: Okay.

MR. COSENZA: I tried to do this rebuttal as quickly as possible and I want to again thank you for your time.

THE COURT: Okay, thank you, Mr. Cosenza. Mr. Shuster.

MR. SHUSTER: Nothing.

THE COURT: All right, so now it's my turn to thank you. We've been at this since -- please, have a seat. We've been at this since --

MR. SHUSTER: There was one day off.

THE COURT: -- November.

MR. SHUSTER: Sorry.

THE COURT: Mr. Goldberg?

MR. GOLDBERG: Apologies, Your Honor.

MR. SHUSTER: We did want to put in the full deck --

MR. GOLDBERG: I thought I was going to say that.

MR. SHUSTER: We did want to put in the full deck because we pared this down with the idea that the full deck would go in.

THE COURT: Okay.

MR. SHUSTER: But we have to pull out one sheet

which is Page 180 out of the deck you have.

THE COURT: Okay.

MR. SHUSTER: We were going -- I was considering making an argument about that but I'm not going to.

THE COURT: Okay.

MR. SHUSTER: So, Page 180, Your Honor, should just pull out --

THE COURT: Of this deck?

MR. SHUSTER: Yeah, and we're going to pull it out of the complete deck, too.

THE COURT: Hold on.

MR. SHUSTER: And with that, I really do have nothing further.

THE COURT: Okay. So, do you folks want to give us the (indiscernible) ---

MR. SHUSTER: Yeah --

THE COURT: -- other materials?

MR. ROLLIN: We do have them now.

THE COURT: Want to just bring them into chambers or hand them up --

MR. ROLLIN: I'd be happy to hand them up.

THE COURT: Whatever you want to do.

MR. ROLLIN: I'm happy to bring them to chambers.

THE COURT: Okay, so just bring them into chambers.

MR. ROLLIN: Thanks, Your Honor.

THE COURT: And then you give us a couple copies of the full deck. That's just so Mr. Shuster can take the position that he's playing with a full deck, right?

MR. SHUSTER: Yes.

THE COURT: 180, that's this page?

MR. SHUSTER: Yes.

THE COURT: So, take this out?

MR. COSENZA: Sorry, wasn't there also the MARM slides here, right?

THE COURT: I took the MARM slide out.

MR. COSENZA: Took that out? Okay.

THE COURT: Yep. I took the MARM slide out.

MR. COSENZA: The Court (indiscernible) slide, the MARM slide.

THE COURT: You can trust me. Okay, we'll take those two out of this deck. Thank you very much. Okay, so my turn to say thank you. We've been at this since November, and Ms. Eisen is not here today, not because she didn't want to be, but we had a lot of schedule changes and we didn't want to -- I didn't want to disrupt her schedule changes.

But, this trial has been unusual in many respects. Number one, first and foremost, degree of difficulty. Certainly, one of the most difficult if not the most

difficult things that I've ever done even though I've been now presiding over Lehman for -- you can say happy anniversary -- four years.

Secondly, the quality of the lawyering was superb, and notwithstanding the degree of difficulty and the many heated exchanges that we had and conferences that we had, I truly am greatly appreciative of how hard everyone worked and how earnest everyone was in their efforts, and to the extent that my patients or good humor flagged, I sincerely apologize. I pride myself on being attentive and being with you every step of the way and sometimes when I feel that I'm not doing as good a job as I could be doing, I get angry at myself and I take that out on others. You can ask my husband. He will verify that phenomenon.

Thank you to all of the support folks, lawyers, legal assistants, technical staff. I know this stuff just doesn't appear, and we appreciate how smoothly that went. And I appreciate the clients who have been coming every day and listening in and so, thank you. I'm very happy to release you from captivity.

The other thing that bears mention is that there were a number of unusual personal challenges that witnesses and counsel faced, and notwithstanding we managed to navigate through that and everybody worked cooperatively to juggle schedules and just get through this. But I've never

experienced anything like that before and hope that I don't and that you don't ever again.

So, with that, we have a lot of work to do. We have established that I'm going to deliver a decision to you on March 8th. Most likely that's going to take the form of my reading to you for many hours. You are not obligated to come down here. It is not fun. I've done it before, but it's in the service of getting something to you consistent with the deadline and in enough detail that I think acknowledges how much this work has been.

But, being somewhat of a perfectionist, I'm not willing to -- I cannot be done in a publishable (indiscernible) decision form by March 8th. It's simply not possible, so I'm going to give you the next best thing, which is to read something that's very detailed. You absolutely are not obligated to come down here. You can dial in. You can come, you can leave. You know, whatever it is.

We had discussed, though, that this all proceeded in order to enable the plan administrator to make a distribution on the timetable in March, and for that we've discussed before that my understanding is that various pieces of paper have to be given to the plan administrator by the Trustee Group and my suggestion, although I don't have any authority to order it, is that you please get that

done as soon as possible, in any event no later than March 1st so the plan administrator has some leeway to make sure that it's all there.

Is there anything more that I should say in that regard? Okay. have a wonderful weekend. Enjoy the Olympics. Get some rest.

MR. SHUSTER: Thank you, Your Honor.

THE COURT: We'll see you in a couple weeks.

MR. COSENZA: Thank you, Your Honor.

THE COURT: Thank you very much.

(Whereupon these proceedings were concluded at 12:47 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
DN: cn=Sonya Ledanski Hyde, o, ou, email=digital1@veritext.com, c=US
Date: 2018.02.14 16:29:36 -05'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: February 14, 2018